Post-Corroboration Safeguards Review
Report of the Academic Expert Group
August 2014
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* This is a copy of a research report written by Fiona Raitt for Rape Crisis Scotland in 2010 and appears, separately paginated, at the end of this document. We are grateful to Rape Crisis Scotland and Fiona Raitt for permission to include this report.
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EXECUTIVE SUMMARY

As a general rule, no person can be convicted of a criminal offence in Scotland in the absence of corroborated evidence. This means that there must be two sources of evidence in respect of each essential element of the crime, including the identity of the accused as the perpetrator of the crime.

The Scottish Government has proposed to abolish this rule. In February 2014, Lord Bonomy was appointed to chair a Reference Group “to consider what additional safeguards and changes to law and practice may be needed in Scotland’s criminal justice system when the corroboration requirement is abolished”. Lord Bonomy’s review is known as the Post-Corroboration Safeguards Review.

It remains the Government’s intention to abolish corroboration as part of the Criminal Justice (Scotland) Bill, currently before the Scottish Parliament.

Lord Bonomy requested that an academic expert group produce a report covering additional safeguards against wrongful conviction and other changes in law and practice which might be considered for introduction into the Scottish criminal justice system.

This is the report of that expert group, which was considered by the Reference Group in September 2014. This report provides background information and analysis based on research into the law and practice of Scotland and other jurisdictions, along with relevant social science literature and decisions of the European Court of Human Rights. It does not make direct proposals for change, but does identify issues and proposals which it is recommended that the Review should consider.

This executive summary provides an account of chapter 4 of the report, which reviews the evidence on causes of wrongful conviction; and Part B, which canvasses various possibilities for change. It does not summarise chapters 1-3, which set out background information, or the separate reports found in Part C. It sets out all the specific issues which the report recommended that the Review consider.

PART A: BACKGROUND TO THE REPORT

CHAPTER 4: CAUSES OF WRONGFUL CONVICTION

Wrongful convictions undoubtedly happen. The rate at which they occur is still open to debate (and it may be – indeed it is likely – that much of the available data cannot be extrapolated to the Scottish context) but wrongful conviction is a very real danger to which the criminal justice system should be alert. The findings of studies into the causes of wrongful conviction are remarkably consistent. Our interest is primarily in what may be termed “evidential” causes of wrongful conviction, which can be identified as eyewitness misidentification; lying witnesses who, for want of a better description, “have something to gain” from their lies (including but not limited to so-called “jailhouse informers” and accomplices); false confessions; and unreliable forensic evidence.

Aside from these evidential causes, there are a number of wider environmental and cognitive factors at play. These include inadequate defence representation; public pressure to convict in serious high profile cases; and (to quote a Canadian commentator) “a local legal environment that has converted the legal process into a ‘game’, with the result that the pursuit of the truth has surrendered to strategies, maneuvering and a desire to win at virtually any cost”. To these can be added a number
of well-documented (at least in the psychological literature) human cognitive biases, such as confirmation bias, hindsight bias and outcome bias, which all lead to tunnel vision: the danger that criminal justice professionals do not view evidence objectively once they have formed a view about the guilt of a particular suspect.

It is also worth noting that wrongful convictions rarely have a single cause. Our concern here is with those risks of wrongful conviction which might be aggravated by the abolition of the corroboration requirement. As such, we are interested primarily in the evidential, rather than the environmental, factors noted above (while still recognising that environmental factors might interact with these). Of particular concern are the issues of mistaken eyewitness identification, false confessions and the evidence of informers and accomplices. As such, each of these problematic forms of evidence is discussed in subsequent chapters of the report.

PART B: ANALYSIS

CHAPTER 5: EYEWITNESS IDENTIFICATION EVIDENCE

The potential for miscarriages of justice inherent in eyewitness identification has been a focus of concern in many jurisdictions. The Scottish courts have expressly recognised these dangers. They stem from many factors, several of which are counter-intuitive and each of which has been well-documented by empirical research:

- People are generally not adept at recognising someone with whom they are not well-acquainted. This is exacerbated where the witness and the perpetrator are from different ethnic groups.

- People can sometimes misidentify even those whom they know well – a phenomenon most of us have experienced in our own lives. There is a tendency to persuade oneself that a person one sees is actually someone whom one knows, while in one’s memory of that event the individual perceived becomes more and more like that person.

- It may be thought that people are likely to have a better recall of unusual events, such as witnessing a crime, than for other, more mundane events. In fact, stressful situations such as being the victim of a violent crime actually lead to a decrease in the likelihood of later accurate identification of the perpetrator.

- It may be thought that an incident in which a weapon is involved would lead to better recall than one where there was no weapon. However, the presence of a weapon (for example, in an armed robbery) decreases the likelihood of an accurate identification of the perpetrator.

- Eyewitnesses identify a known wrong person (a “stand-in” or “filler”) in approximately 20 per cent of police identification parades.

- Contrary to what jurors or other observers of eyewitness testimony may assume, there is no correlation between confidence in identification at trial (as distinct from during the pre-trial identification procedure) and accuracy of identification. This makes it very difficult for a judge or
jury to assess the evidence; we tend to assume that a witness who is certain that the accused is the perpetrator is more likely to be right about this than a witness who is hesitant or less sure. There is a lack of scepticism on the part of jurors; they tend to give too much weight to confident assertions of positive eyewitness identification.

The chapter reviews possible safeguards, and suggests that the Review should consider whether, in cases in which identification of the accused as the perpetrator is in dispute:

(a) legislation should specify that dock identification evidence is generally inadmissible unless there has been a positive identification of the accused as the perpetrator during a properly conducted pre-trial identification procedure.

(b) an exception to the rule in (a) should be made where the accused refused to co-operate in the holding of a pre-trial identification procedure, or it was not otherwise reasonable for such procedure to be held.

(c) legislation (or a code of practice required by legislation) should specify requirements governing the conduct of pre-trial identification procedures, and the circumstances in which an identification procedure should take place.

(d) the requirements specified in such legislation should include the following:

- There should be a minimum of eight stand-ins or images other than that of the suspect, in an identification procedure;
- The officer conducting the procedure should not know which of the participants/images is the suspect;
- The officer in charge of the case should not be present during the procedure;
- Stand-ins/fillers should generally resemble the verbal description given by the witness, rather than look similar to the suspect;
- Video identifications should be done sequentially, with one person or image being shown to the witness at a time;
- Witnesses should be asked immediately following the viewing of each image whether the image is, or resembles, that of the perpetrator; and about their level of confidence;
- The entire procedure should be video recorded.

(e) material breaches of the statutory requirements for holding pre-trial identification procedures should result in the exclusion of the evidence. This could be achieved through a provision similar to section 78(1) of the Police and Criminal Evidence Act 1984; such a provision would be of general application and would serve to implement suggestions made in other chapters of this report regarding the exclusion of evidence on the grounds of fairness.

(f) the police should employ cognitive interviewing techniques to enhance witness recall.

(g) in solemn cases in which identification of the accused as the perpetrator is an issue at the trial, legislation should specify that trial judges must direct juries of the dangers of convicting in cases involving uncorroborated identification evidence.

(h) the form of wording for such a direction should be specified in the Jury Manual, to minimise appeals, but with discretion to allow for the circumstances of the case.
(i) the trial judge should stress the specific dangers associated with eyewitness identification, and its association with wrongful convictions. The charge in Farmer should be taken as a starting point of factors to be considered, but jurors should also be told that mistakes are common – more so where the witness and perpetrator did not know each other prior to the incident in question, but can occur even where they were previously well acquainted. They should be informed that confidence in asserting a “positive” identification at the time of the trial is not necessarily associated with accuracy.

(j) legislation should specify that in cases where identification of the accused as the perpetrator is contested, the trial judge should have the power, in solemn procedure, to uphold a submission of no case to answer and withdraw the case from the jury on the basis that the quality of the eyewitness identification is such that a properly directed jury could not reasonably convict the accused, and, in summary procedure, to uphold such a submission on the basis that he or she could not find the offence proved beyond reasonable doubt.

(k) judicial training should be given on eyewitness identification evidence.

CHAPTER 6: CONFESSION EVIDENCE

The intuitive persuasiveness of confession evidence stems from the fact that a statement against interest is thought more likely to be true than false. There are, however, numerous instances where false confessions have led to wrongful convictions. Some are particularly well known: in the US, for example, in what has come to be known as the “Central Park Jogger case”, five suspects were wrongfully convicted of the assault and rape of a female runner. All five of the suspects confessed to the crime. In England, Timothy Evans, who was executed for the murder of his daughter but subsequently exonerated via a royal pardon in 1966, confessed to the crime.

Why would someone confess falsely to a crime, in the absence of “unfair” practices? The social science literature indicates that there are myriad reasons for this. For instance, the confessor might desire to: avoid a “worse” outcome than conviction; protect a loved one; or brag/seek attention. The confessor might be mentally vulnerable or ill; in this context it is worth noting that false confessions are disproportionately common among juvenile suspects and suspects with cognitive impairments or psychological disorders. That is not to mention simple fabrication of a confession by investigators (a matter which would, if the allegation of fabrication was credible, result in exclusion of the evidence on the grounds of fairness to the accused), or a third party (such as a cellmate).

Insofar as is known, Scotland has not had great problems with false confessions to date. The requirement of corroboration has insisted on the accused’s guilt being established by evidence from a source independent of the accused (except, to an extent, in “self-corroborating” confession cases), which limits the risk that a false confession will lead to a wrongful conviction. If the requirement of corroboration is abolished, then the risks associated with false confessions might become more significant. It is impossible to know the extent of these risks.

The chapter reviews the current law in Scotland and elsewhere, and suggests that the Review should consider whether:
(a) jury directions regarding the risks associated with false confessions might usefully be developed for use in appropriate cases;

(b) a requirement of corroboration should be retained in cases where the prosecution rely on confession evidence and, if so, what form it should take;

(c) if a corroboration requirement is retained for confession evidence, whether “special knowledge” should, given the concerns raised about the weakening of the special knowledge requirement in chapter 3.5, be limited strictly to cases where the only reasonable explanation for the information concerned being known to the accused was that he was the perpetrator.

CHAPTER 7: EVIDENCE OF ACCOMPLICES AND INFORMERS

Chapter 4 established that false evidence given by accomplices or informers is one of the leading causes of wrongful conviction. It might be thought that jurors will appreciate the need to treat with caution the evidence of those who have something to gain in seeing the accused convicted, or – as once expressed by a Scottish judge – “a temptation to minimise their part in the crime and blacken the accused”. The limited empirical research that has been undertaken in this area, however, suggests that this cannot be assumed.

The one study that has been undertaken suggested that even the presence of an incentive offered to an accomplice/jailhouse informant to testify against the accused will not impact meaningfully on a jury’s decision to convict. The authors of the study found that “juror conviction rates were unaffected by the explicit provision of information indicating that the witness received an incentive to testify” and that this was “despite the fact that participants perceived the witnesses who received incentives as less interested in serving justice and more interested in serving self-interests”. Although there is (as far as the expert group knows) no empirical evidence on other “suspect” witnesses (i.e. those with a grudge), it might be that juries are not as cautious with such evidence as would be hoped. Psychological research more generally supports this point, suggesting that juries will not necessarily place sufficient weight on the fact someone has a vested interest in testifying against the accused.

It has also been suggested that the evidence of accomplices and informers might be problematic because such witnesses (who might have given evidence against multiple accused persons) could be “very accomplished liars”. In this context, it is worth noting that one of the most consistent findings of psychological research is that people are extremely poor at detecting when another person is lying, and that mistaken beliefs about the cues by which lying can be detected (such as the belief that liars avert their gaze) are commonplace, which does not augur well for the accurate identification of lying witnesses by juries.

With these points in mind, strong consideration should be given to the adoption of some protective measure(s) in relation to the evidence of accomplices and informers, particularly if the existing protection of the requirement of corroboration is removed. It is suggested that the Review should consider whether:

(a) jury directions regarding the risks associated with the evidence of accomplices and informers might usefully be developed;
(b) such directions should be mandatory, or should be given on a discretionary basis, and when (if at all) they might be appropriate in relation to the evidence of a co-accused;

(c) there should be a general exclusionary power giving the trial judge discretion to refuse to admit accomplice evidence where, in the light of its seeming unreliability, or an inducement such as a reduced sentence, its admission would impact adversely on the fairness of proceedings.

CHAPTER 8: HEARSAY EVIDENCE

At present, no person accused of crime in Scotland can be convicted solely on the basis of a single piece of hearsay evidence. With the abolition of the requirement of corroboration, convictions could, however, be returned in such cases.

There is a danger of Scots law becoming non-compliant with the European Convention on Human Rights if hearsay evidence is permitted to be the “sole and decisive” evidence against an accused person. It is suggested that the Review should consider whether a statutory supporting evidence requirement should be introduced for cases where the “sole and decisive” evidence against the accused is hearsay.

It will be noted that previous chapters have raised the question of whether Scottish judges should have a general power, analogous to that in England under section 78(1) of the Police and Criminal Evidence Act 1984, to exclude evidence where its admission would impact adversely on the fairness of proceedings. Such a power would be equally applicable to hearsay as to other categories of evidence.

CHAPTER 9: JURY DIRECTIONS

It has been suggested that certain types of evidence might pose a risk of wrongful conviction, especially in the absence of a corroboration requirement – most notably eyewitness identification evidence, confession evidence and the evidence of accomplices and informers. It has been proposed in other chapters that one way of countering this would be to warn jurors of the risks these types of evidence pose by way of a jury direction. This chapter discusses the effectiveness of jury directions as a safeguard against the risk of wrongful conviction with reference to the relevant experimental research.

It has sometimes been suggested that jury directions on the reliability of witness testimony are either ineffective or undesirable and, in particular, might have the opposite effect on the jury to the one intended, by drawing attention to the most damning parts of the prosecution case. In a review of the available evidence undertaken in 1995, Cutler and Penrod stated that “we are forced to conclude that the judges’ instructions do not serve as an effective safeguard against mistaken identifications and convictions”. This section assesses these claims in light of the available experimental evidence and concludes that, contrary to the conclusion drawn by Cutler and Penrod, there is reason for cautious optimism about the effectiveness of jury directions.

A review of the literature suggests three principal routes to improving the effectiveness of jury directions: simplifying the language used; ensuring that the directions accurately reflect the relevant considerations; and providing a written copy to jurors.

It has already been proposed in previous chapters that consideration should be given to making jury directions mandatory in cases involving uncorroborated identification evidence, where identification of the accused as the perpetrator is an issue at the trial (chapter 5), and discretionary in cases involving other types of problematic evidence (those discussed in chapters 6 and 7). In order to maximise the effectiveness of such directions, it is suggested that the Review should consider:

(a) the provision of written directions to jurors (or providing the information in an alternative format to any juror who would have difficulty accessing a written copy);

(b) the wording of sample directions being checked not only for legal and scientific accuracy, but also for comprehensibility, ideally by those with expertise in the use of plain language;

(c) recommending that research be commissioned into the effectiveness of various forms of wording for jury directions.

CHAPTER 10: RECORDING OF POLICE INTERVIEWS

The recording of interviews by the police is not expressly part of the (non-exhaustive) remit of the Post-Corroboration Safeguards Review. The extent to which interviews are recorded was, however, suggested from within the Reference Group as an appropriate topic for the Review’s consideration during the course of the Review’s work, and Lord Bonomy asked the expert group to address this issue as part of its report. In Scotland, there is no general published guidance on when police interviews should be recorded, either in audio or visual form, and the expert group has been advised that there are no strict rules on this matter.

The advantages of audio or visual recording are relatively clear and uncontroversial. Such recording will provide a more accurate record of the interview than note taking, and avoids unnecessary dispute about what was said, something which may avoid not just disputes at the trial but prevent unnecessary trials taking place. It is a safeguard both for the police and for the suspect. Against this, of course, the resource implications inherent in the recording of interviews are potentially significant: even if modern technology allows for a recording to be produced with relative ease, transcription of significant numbers of interviews is time consuming and expensive. It should also be recognised that any process for the recording of interviews will have disadvantages as well as benefits, and it would be dangerous to assume that any one approach is wholly beneficial.

There could be considerable benefits in codes of practice, similar to those found in England and Wales, being drawn up for Scotland in terms of clarifying procedure and helping to maintain public confidence in the investigative process. That need not involve the Review prescribing the content of any such code in detail. If the principle of a code were accepted, its content would be a matter for the Cabinet Secretary for Justice following discussions with Police Scotland and other interested parties, subject to any specific requirements of consultation which might be prescribed by legislation.

It is suggested that the Review should consider whether:
(a) a statutory duty, analogous to section 60 of the Police and Criminal Evidence Act 1984, should be placed on the Scottish Ministers to issue a code of practice relating to the recording of interviews of suspects by the police;

(b) it would be appropriate, in cases where the terms of such a code of practice are not followed, that the admissibility of such statements should continue to be subject to the common law test of fairness;

(c) there are any matters within the scope of the Review, not elsewhere covered in this report, which should similarly be addressed by way of a code of practice, particularly the detention, treatment and questioning of persons by police officers.

CHAPTER 11: SHOULD THERE BE A STATUTORY SUFFICIENCY TEST FOR PROSECUTORS?

Since 2001, the Crown Office and Procurator Fiscal Service (COPFS) has issued a Prosecution Code which explains briefly the criteria on which its decisions are based. On the issue of the decision whether to prosecute, the Code does not set out one short and superficially simple test, as is done in some other jurisdictions. Instead it starts by explaining that the procurator fiscal must be satisfied that there is “sufficient admissible evidence” to justify commencing proceedings.

Evidence submitted to the Justice Committee by COPFS indicated that in the absence of a corroboration requirement, a new prosecution test would require prosecutors to consider whether there is “a reasonable prospect of conviction in that it is more likely than not that the court would find the case proved beyond a reasonable doubt”.

The prosecutorial test which COPFS indicated in 2013 that they would apply in the absence of a corroboration requirement is appropriate. Enshrining this test in statute would not, however, be appropriate. Section 4 of the Victims and Witnesses (Scotland) Act 2014 significantly strengthens the position of victims of crime by giving alleged victims the right to challenge decisions not to prosecute. It is suggested that the abolition of corroboration does not, therefore, require further steps to be taken in terms of the prosecutorial test itself or challenges to decisions not to prosecute, although the Review may wish to consider whether the Lord Advocate should formally be required by statute to publish the prosecutorial test.

CHAPTER 12: THE NO CASE TO ANSWER SUBMISSION

The no case to answer submission permits a trial judge to stop a trial at the end of the prosecution case unless there is corroborated evidence of each essential fact which the prosecution must prove. Unless the law on this issue is changed, the Scottish no case to answer submission would be weaker than most comparable jurisdictions following the abolition of corroboration. It would not be unique, however, being broadly similar to the position taken in Australia and Canada, restricting such submissions to cases where there is simply no evidence against the accused in respect of a crucial element of the prosecution case.
One difficulty in this area is that the purpose of the no case to answer submission is surprisingly obscure. While it is consistently found across the major common law jurisdictions, discussion of it generally focuses on the test to be applied, with little said about the underlying rationale. It is sometimes characterised as a safeguard against wrongful conviction, but if the submission existed solely to prevent the conviction of the factually innocent, there would be no reason to locate it at the end of the prosecution case rather than at the end of the trial as a whole.

A better explanation is that the accused in a criminal trial should not be forced into assisting in his or her own prosecution. A person should not be required to answer allegations made against him or her unless the Crown has established a prima facie case. Although the accused is not compellable as a witness, and need not lead any evidence at all, the progress of a prosecution beyond the close of the prosecution case represents a very real form of compulsion on the accused to answer the allegations made against him or her. It is therefore wrong that such compulsion should be placed on the accused unless there is evidence to support the allegations which have been made. The protection against wrongful conviction which the submission offers is real, but is incidental to its primary purpose.

It is suggested that the Review should consider whether a judge should be empowered to uphold a submission of no case to answer if, in solemn procedure, he or she considers that as a matter of law, a properly directed jury could not reasonably convict the accused; and in summary procedure, if, on the evidence led by the prosecution, he or she could not find the offence proved beyond reasonable doubt.

Section 97A of the Criminal Procedure (Scotland) Act 1995 permits the accused in solemn procedure, after the close of the whole of the evidence or the conclusion of the prosecutor’s address to the jury, to submit that the evidence is insufficient in law to justify his conviction. If the suggestion above is accepted, it would seem logically to follow that section 97A (and, consequentially, section 97B) should be amended to refer to a submission that no properly directed jury could reasonably convict on the evidence led.

CHAPTER 13: JURY MAJORITY, SIZE AND VERDICTS

Compared to other jurisdictions, the Scottish jury system is very peculiar indeed. Uniquely, the jury has three verdicts (guilty, not guilty, and not proven) open to it, reaches verdicts by a simple majority, and comprises fifteen members. Elsewhere in the common law world, although there is some variation, juries generally have twelve members, and must reach verdicts – of which there are only two possibilities – by unanimity or near-unanimity.

The simple majority verdict, in particular, has long been regarded with suspicion by comparativists. The first systematic study of miscarriages of justice in the English-speaking world identified the Scottish rule of verdicts by simple majority as a problematic rule which might increase the risk of wrongful conviction. More recently, international commentators have doubted whether the simple majority verdict can be reconciled with the requirement of proof beyond reasonable doubt, but have suggested that the (equally, if not more, distinctive) requirement of corroboration can justify Scotland’s divergence from the practice elsewhere.
The requirement of unanimity or near-unanimity found throughout the common law world is regarded as a consequence of the requirement of proof beyond reasonable doubt, the presumption of innocence, and the view that a jury verdict is a collective decision. The verdict is one of the jury as a whole, not simply the result of counting votes in a ballot. Over time, this rule has been qualified in most – not all – jurisdictions to permit juries to return verdicts by qualified majority. Qualified majority rules exist because of a recognition that in some cases an individual juror, or perhaps two jurors, may not participate properly in the process, because they have been intimidated or have taken an unreasonable or perverse approach to their task. The acceptance of a qualified majority, therefore, does not undermine the principle that the verdict should be one of the jury as a whole. Instead, it recognises that an individual juror or jurors may not be willing or able properly to participate in the collective decision-making process.

The distinctive Scottish approach has consistently been justified on the basis that Scotland applies a unique set of practices in jury trials – corroboration, three verdicts and simple majority verdicts – which, taken together, represent a proper approach to the criminal justice system’s key goal of acquitting the innocent and convicting the guilty. Corroboration’s removal, however, means that this justification no longer holds, and so the other two distinctive features of the Scottish jury require reconsideration.

Following a review of the available evidence, and the law in comparable jurisdictions, this chapter concludes that:

- The simple majority jury verdict is an anomaly out of step with the common law world, difficult to reconcile with the presumption of innocence and the requirement of proof beyond reasonable doubt.
- It has previously been suggested that the simple majority verdict may, exceptionally, be justified because of Scots law’s equally exceptional requirement of corroboration.
- The simple majority verdict may also be viewed as something of a trade-off against the not proven verdict, although the practical consequences of either rule cannot meaningfully be quantified.
- Other common law jury systems have started from the principle that jury verdicts ought to be returned unanimously, but most have qualified this over time to allow a verdict to be returned despite one or (in some cases) two jurors dissenting.
- Such rules have been adopted principally to account for the possibility of one or more “rogue” or intimidated jurors undermining the jury’s function, rather than because of any numerical calculation as to what amounts to proof beyond reasonable doubt.
- Twelve has been accepted as the appropriate size for the jury throughout the common law world, and there is convincing empirical evidence cautioning against any significant reduction in size below this.
- There is an absence of direct evidence as to the quality of decision making by larger juries, although the more general literature on group decision-making might tentatively be taken to suggest that juries of larger than twelve are unlikely to be any better at performing their function than the twelve-person jury, and may even be worse.
- If changes are made to the Scottish jury such as removing the not proven verdict or requiring verdicts by near-unanimity, we can be reasonably confident as to how such rules would operate in the context of a twelve-person jury given experience elsewhere, but we have no
evidence as to how such rules would operate in the context of a fifteen-person jury. This may itself be a persuasive reason for adopting the twelve-person jury if other changes are made.

- The not proven verdict offers a degree of protection against wrongful conviction by rendering juries less likely to convict in marginal cases.
- It does so, however, at a cost: jurors may misunderstand the consequences of the verdict, its availability as a compromise verdict may inhibit deliberation, and it is undesirable in principle to have two different verdicts of acquittal when the difference between them cannot properly be articulated.

It is suggested that the Review should consider whether:

(a) the not proven verdict should be abolished;
(b) the size of the jury should be reduced to twelve members;
(c) the jury should be required to reach a verdict by a qualified majority, which might take one of the following forms:
   (i) ten of twelve votes required for a verdict of either guilty or not guilty, with a failure to reach a verdict resulting in a hung jury and the possibility of a retrial;
   (ii) ten of twelve votes required for a verdict of guilty, with anything short of this resulting in an acquittal and no possibility of a retrial (unless the provisions of the Double Jeopardy (Scotland) Act 2011 applied).

There may be room for modification of these numbers. In option (ii), consideration could perhaps be given to permitting conviction by nine of twelve jurors, but this might itself be thought difficult to reconcile with the presumption of innocence and proof beyond reasonable doubt.

(d) how any qualified majority rule should operate in the context of a jury which has reduced in size over the course of the trial. Possible options in this regard are set out in chapter 13.10.

It is suggested that the Review should invite submissions as to how, if the not proven verdict is to be retained, it should be defined so as to allow for proper direction to be given to juries.

CHAPTER 14: ALTERNATIVE APPROACHES TO EVIDENTIAL SUFFICIENCY, AND RESIDUAL ISSUES

Scots law has been almost unique in modern systems in retaining a general corroboration requirement. While common lawyers sometimes speak loosely of civilian systems requiring corroboration, the group’s enquiries have yielded no sign that this is true as a contemporary fact, apart from the Dutch recognition of the principle of unus testis, nullus testis. Certainly, every system at one point featured elaborate rules indicating the number of witnesses required to prove particular crimes or to convict particular categories of accused. When these fell into desuetude, civilian systems did tend to retain a general corroboration requirement. However, often the existence of a single witness justified the use of torture to secure a confession, thus providing corroboration, a feature which ultimately discredited the requirement. That said, while other systems do not feature a general corroboration requirement, the concept of corroboration is widely
known. Thus the starting point for this chapter is to ask what sort of evidence is regarded as corroborative in other systems. The chapter then continues with an examination of whether a corroboration requirement might be retained for specific offences or specific types of evidence. Finally the chapter asks whether, if the requirement for corroboration is abandoned, it may be necessary or desirable to warn juries regarding the danger of convicting an accused person on the basis of uncorroborated evidence, either generally or in certain circumstances, or whether it might be necessary to prohibit judges from issuing warnings in certain circumstances.

This chapter is presented for information, and no specific issues are identified for the Review’s consideration.

CHAPTER 15: INDEPENDENT LEGAL REPRESENTATION FOR COMPLAINERS IN SEXUAL OFFENCE CASES

As with the recording of police interviews (chapter 10 of the report), independent legal representation for complainers in sexual offence cases (ILR) is not expressly part of the (non-exhaustive) remit of the Post-Corroboration Safeguards Review. It was, however, suggested from within the Reference Group as an appropriate topic for the Review to consider, and Lord Bonomy asked the expert group to address this issue as part of its report.

A considerable amount of work on the possibility of introducing independent legal representation for complainers in sexual offence cases in Scotland has already been done by Fiona Raitt. Rape Crisis Scotland and Professor Raitt have kindly agreed to a report on the topic which Professor Raitt wrote for Rape Crisis Scotland in 2010 being included as an appendix to this report. As the report is an extensive treatment of the topic, there is a limit to what can usefully be added here, and this chapter does not seek to offer a full treatment of ILR. Instead, it summarises what might be proposed under this heading and highlights certain points for the Review’s consideration.

ILR, at least in the form which it has been advocated in Scotland to date, is not any sort of status as an equal party with the prosecutor; it is instead a right to make representations at certain specific points. It bears similarities to the limited rights to representation which have been recognised in Canada (in respect of disclosure of personal records) and Ireland (in respect of applications to lead sexual history evidence).

It is assumed from the fact that the expert group has been asked to cover ILR in this report that the Review will wish to consider whether a pilot ILR scheme might be recommended for Scotland and what its scope should be. Accordingly, this chapter is presented solely to inform the Review in considering these issues. It is suggested that it will be necessary to consider:

(a) whether the principle of ILR should be supported;
(b) whether any ILR scheme should be introduced on a pilot basis in the first instance;
(c) at which stages of the criminal justice process ILR should be permitted, and
(d) whether and to what extent the legal framework governing warrants and disclosure should be amended to permit this.
CHAPTER 1: INTRODUCTION

1.1 Background

Scots law currently maintains a rule that (subject to limited statutory exceptions) no-one can be convicted of any criminal offence in the absence of corroborated evidence. This rule goes beyond a general requirement of “supporting evidence”; there must be two sources of evidence in relation to each element of the actus reus and mens rea of a criminal offence.¹ The Scottish Government has proposed to abolish this rule. On 6 February 2014, the Scottish Government announced the appointment of Lord Bonomy (a former senior Scottish judge and judge of the International Criminal Tribunal for the Former Yugoslavia) to chair a Reference Group “to consider what additional safeguards and changes to law and practice may be needed in Scotland’s criminal justice system when the corroboration requirement is abolished”. It remains the Government’s intention to abolish corroboration as part of the Criminal Justice (Scotland) Bill, currently before the Scottish Parliament.

Lord Bonomy’s terms of reference require his review – referred to as the Post-Corroboration Safeguards Review – to consider the following non-exhaustive list of issues:

- Whether a formal statutory test for sufficiency based upon supporting evidence and/or on the overall quality of evidence is necessary
- Whether any proposed prosecutorial test or a requirement for publication of any such test should be prescribed in legislation
- The admissibility and the use of confession evidence
- The circumstances in which evidence ought to be excluded
- The practice of dock identification
- Jury majority and size
- The future basis [for] and operation [of] a submission that there is no case to answer at the end of the prosecution case
- Whether a judge should be able to remove a case from a jury on the basis that no reasonable jury could be expected to convict on the evidence before it
- Whether any change is needed in the directions that a judge might give a jury, including a requirement for special directions in particular circumstances
- Whether any additional changes are required in summary proceedings.

Lord Bonomy requested that, in order to inform the work of the Review, an academic expert group produce a report on additional safeguards against wrongful conviction or other changes in law and practice as might be considered for introduction into the Scottish criminal justice system, drawing on academic literature, law and practice in other jurisdictions, and the jurisprudence of the European Court of Human Rights. This report does not, therefore, make direct proposals for change, but instead identifies issues and proposals which were considered by the Review (with the assistance of the Reference Group) in preparing its consultation document.

¹ The current law is set out in detail at ch 3 of this report.
1.2 The membership of the academic expert group

The academic expert group comprised James Chalmers (Regius Professor of Law, University of Glasgow), Fraser Davidson (Professor of Law, University of Stirling), Pamela Ferguson (Professor of Scots Law, University of Dundee), Peter Duff (Professor of Criminal Justice, University of Aberdeen), Fiona Leverick (Professor of Criminal Law and Criminal Justice, University of Glasgow), and Findlay Stark (Yates Glazebrook Fellow in Law, Jesus College, Cambridge; Affiliated Lecturer (Faculty of Law), University of Cambridge). Research assistance was provided by Alasdair Shaw (Research Assistant in Criminalisation, University of Glasgow). The group was convened by Professor Chalmers; the report was edited by Professor Chalmers, Professor Leverick and Mr Shaw.

In addition to the work produced by the expert group, this report incorporates, in Part C, three additional reports by other authors: the first by S J Summers (SNSF Professor of Criminal Law and Criminal Procedural Law, University of Zurich), the second by Leonie van Lent (Assistant Professor of Criminal Law and Criminal Procedure, Willem Pompe Institute for Criminal Law and Criminology, Utrecht University) and Ingeborg Braam (Masters student of criminal law participating in the LLM in Legal Research, Utrecht University) and Fiona Raitt (Professor of Evidence and Social Justice, University of Dundee).

1.3 The scope of the report

As noted at 1.1 above, the list of issues identified in Lord Bonomy’s remit is a non-exhaustive one. Consultations were carried out both with other academics (see 1.5 below) and the Reference Group as to whether additional issues should be considered. Although individual respondents identified other potential issues, this exercise demonstrated a broad consensus that those identified in the remit were the correct ones.

During the course of the expert group’s work, and based on suggestions received during the above exercises, the group was asked by Lord Bonomy to consider two additional issues: (a) recording of police interviews and (b) independent legal representation for complainers in sexual offence cases. The latter of these issues was the subject of a research report written by Fiona Raitt for Rape Crisis Scotland in 2010, and we are grateful to Rape Crisis Scotland and Professor Raitt for permission to reproduce that report here as an appendix to our own. We also include brief chapters on both of these issues.

In discussions which we have had both as a group and with others, reference has frequently been made to the Scottish Law Commission’s Report on Similar Fact Evidence and the Moorov Doctrine, which was published in 2012. The Commission’s proposals have not yet been implemented by legislation, although the Cabinet Secretary for Justice indicated in response to the Commission’s report that he intended to do this “at an appropriate opportunity”. The Commission’s proposals would radically broaden the extent to which evidence of the accused’s bad character (including

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2 Although funding for Mr Shaw’s work on this project was provided by the Post-Corroboration Safeguards Review, we are grateful to the Leverhulme Trust for funding his post; had he not already been in post at the time we were asked to take on this work our task would have been rather more difficult.


previous convictions) could be used as proof of guilt. We note that the Commission chose to “proceed upon the basis that the requirement for corroboration will remain”, although it also claimed that the abolition of corroboration would not undermine its recommendations.

It would not have been appropriate – or, in the time available, practical – for us to revisit the Commission’s work on this topic. Given, however, the radical nature of the Commission’s proposals, which have been strongly criticised by one member of this group, and the potential implications of implementing them in the absence of a corroboration requirement, we would strongly caution against any direct implementation of them in the absence of a corroboration requirement without reconsideration, whether by the Commission itself or otherwise.

1.4 The structure of the report

This report is divided into three parts. Part A (chapters 2-4) provides background information on the law of corroboration, the cases which have been made for its abolition, and the available research on the causes of wrongful convictions. Part B (chapters 5-15) reviews existing and potential safeguards against wrongful conviction in a wide variety of contexts, along with the issue of independent legal representation for complainers in sexual offence trials. Part C contains four freestanding reports: an international comparison of evidential rules (by Pamela Ferguson); a report on article 6 of the ECHR and the development of criminal evidential rules in Europe (by S J Summers); a report on the Dutch rule of unus testis, nullus testis (one witness is no witness) (by Leonie van Lent and Ingeborg Braam); and a copy of a report on independent legal representation for complainers in sexual offence trials prepared for Rape Crisis Scotland by Fiona Raitt in 2010.

All of the chapters of this report (save the introduction) are the responsibility of the individual authors identified at the start of each chapter. However, individual chapters identify a variety of issues for consideration by the Review, on which the expert group as a whole are agreed.

1.5 Acknowledgments

While some specific acknowledgments of assistance appear in individual chapters, we have been assisted more generally in our work by two advisory panels, comprising experts from both Scotland and elsewhere.

Members of these panels contributed to our work in a variety of ways depending on their own availability, including responding to a consultation on the Review’s scope noted above, participating in two seminars which took place to discuss the work of the expert group (one in Glasgow in June 2014 and one in Cambridge in July 2014), responding to a questionnaire on evidential rules in other jurisdictions (reported on in chapter 16), commenting on draft work, answering questions and offering advice. We are extremely grateful for their assistance. The expert group remains responsible for the content of this report.

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5 Scottish Law Commission, Report on Similar Fact Evidence and the Moorov Doctrine (n 3) para 3.44.
6 Para 3.45.
7 Save to the extent that it is discussed in the context of the account of the current law of corroboration in ch 3.3 below.
The full list of experts who assisted us in this way is as follows:

Ragna Aarli (Bergen), Derek Auchie (Aberdeen), John Blackie (Strathclyde), Michele Boggiani (Parma), Ingeborg Braam (Utrecht), Alberto Cadoppi (Parma), Ilona Cairns (Aberdeen), Liz Campbell (Edinburgh), Daniel Clausén (Uppsala), Kenneth Dale-Risk (Edinburgh Napier), Ian Dennis (University College London), Mo Egan (Abertay), Lindsay Farmer (Glasgow), Chris Gallavin (Canterbury), Chris Gane (Chinese University of Hong Kong), Sir Gerald Gordon, Lissa Griffin (Pace, New York), David Hamer (Sydney), Claire McDiarmid (Strathclyde), Jenny McEwan (Exeter), Colin Macintosh (University of the West of Scotland), Gerry Maher (Edinburgh), Verena Murschetz (Innsbruck), Donald Nicolson (Strathclyde), Nicola Padfield (Cambridge), Mike Redmayne (London School of Economics), Paul Roberts (Nottingham), P J Schwikkard (Cape Town), Laura Sharp (Robert Gordon University, Aberdeen), John Spencer (Cambridge), Sheriff Charles Stoddart, S J Summers (Zurich), Magnus Ulväng (Uppsala), Leonie van Lent (Utrecht), Thomas Weigend (Cologne), Rhonda Wheate, along with anonymous participants from Canada, England, Ireland and the United States of America.

For assistance with particular aspects of the report or requests for information, we are grateful to Detective Superintendent Pat Campbell (Specialist Crime Division, Police Scotland), Joe Moyes (Deputy Principal Clerk of Justiciary), Alan Page (University of Dundee) and Susan Sutherland (Scottish Law Commission).

More generally, we are grateful to Lord Bonomy, Craig French (Secretary to the Review) and particularly to Chris Crowther (Assistant to the Review Secretary) for all their assistance.
CHAPTER 2: CORROBORATION: CONSEQUENCES AND CRITICISM

James Chalmers

The question of whether corroboration should be abolished is not part of the remit of the Post-Corroboration Safeguards Review, and it is not a question which this chapter seeks to answer. In considering alternative safeguards, however, it is essential properly to understand the effect of the corroboration requirement and the grounds on which the corroboration requirement has been criticised.

The current law of corroboration is discussed in detail in chapter 3. In summary, it is a rule that in a criminal case, there must be two sources of evidence in respect of each “crucial fact”. Without such evidence, a conviction is impossible, regardless of the persuasive weight of whatever evidence has been adduced. The report of the Carloway Review contained a detailed discussion of how the requirement for corroboration had developed in continental Europe but had (largely) been abandoned on the Continent in favour of principles of free proof.

A rule of unus testis, nullus testis (one witness is no witness) does survive in the Netherlands and is discussed in an appendix to this report.

2.1 What practical effect does a corroboration rule have?

Hume, in comparing the criminal law of Scotland and England, saw corroboration as an advantageous rule denied to English defendants, although he preferred to present it not as a straightforward advantage but rather as a trade-off whereby Scotland could justify permitting simple majority jury verdicts rather than the unanimity demanded in England.

Other writers, such as Alison, were more sceptical as to whether corroboration provided any significant additional safeguard for those accused of crime. Dickson wrote that:

The law of England recognises a different rule...; the evidence of one witness, if believed by the jury, being sufficient in almost all cases. Yet, as has been well observed, this difference is more apparent than real; for the credibility of a single witness can seldom be ascertained without corroborating circumstances, the want of which often leads to an acquittal on the advice of the Court; while, in Scotland, the absence of a second witness may be supplied by circumstances, and, if there is such corroboration, it lies with the tribunal to say whether the whole evidence is credible.

There is modern empirical research which provides some evidence as to the practical effect of the corroboration rule. In the 1990s, two research studies were carried out for the Royal Commission on

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1 Smith v Lees 1997 JC 73.
3 See ch 18.
5 A Alison, Practice of the Criminal Law of Scotland (1833) 554 (“where the principles of the two [Scots and English] laws seem fundamentally at variance, the difference in practice is really not so considerable as might be expected”).
6 W G Dickson, A Treatise on the Law of Evidence in Scotland (P J Hamilton Grierson’s edn, 1887) para 1812. The “well observed” reference is to Alison’s Practice.
Criminal Justice. At the time, there was particular concern in England and Wales about convictions on the basis of uncorroborated confession evidence, and the studies were concerned in particular with prosecutions founded on a confession by the accused.

The first of the two studies found that only 30 of a sample of 2210 magistrates’ court cases relied on confession evidence alone. The second estimated that in 524 cases, 14 convictions based on confessions “would probably have become acquittals because of the apparent lack of supporting evidence of any kind”.

These studies suggest that in a system – such as England and Wales – which does not require corroboration, few prosecutions will actually be brought in the absence of corroborating evidence, no doubt because it is difficult to satisfy a finder of fact that proof beyond reasonable doubt has been made out in such cases.

The Carloway Review itself included a research report from Crown Office which purported to assess the effect of the corroboration rule. This research suggested that in two samples of cases which had been discontinued on the grounds of insufficient evidence, a “reasonable prospect of conviction” existed in over half (59 per cent in one sample, 67 per cent in another). The design of that research study has been strongly criticised, and Lord Carloway said himself that removing the requirement of corroboration “may not result in significant changes to conviction rates”.

When the Criminal Justice (Scotland) Bill was introduced into the Scottish Parliament, the accompanying Financial Memorandum suggested a rather more conservative picture:

...shadow reporting and shadow marking exercises carried out by Police Scotland and COPFS suggest that there are likely to be increases in the number of cases reported by the Police to COPFS, and in the number of cases prosecuted by COPFS. The potential scale of increase is as follows:

- Police – increase in police reports to COPFS in the range 1.5%-2.2%, with a most likely estimate of 1.5%
- COPFS – change in summary prosecutions in the range of a 1% decrease to a 4% increase, with a best estimate of a 1% increase; and increase in solemn prosecutions in the range of 2-10% increase, with a best estimate of a 6% increase.

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8 Ibid. See M McConville, Corroboration and Confessions: The Impact of a Rule Requiring that No Conviction can be Sustained on the Basis of Confession Evidence Alone (Royal Commission on Criminal Justice Research Study No 13, 1993).
10 The Carloway Review: Report and Recommendations (2011) para 7.2.41. This is a reference to conviction rates and not to the absolute number of convictions. It might be suggested that the abolition of corroboration would lead to a greater number of prosecutions and therefore a greater number of convictions overall, even if the conviction rate remained the same. However, Lord Carloway was later to suggest in evidence to the Justice Committee that the abolition of corroboration would mean that “although the total number of convictions may or may not go up or down, one would hope that if there is a focus on quality, the number of convictions per prosecution ought perhaps to go up”: Justice Committee Official Report, 29 November 2011, col 528.
2.2 Why has England and Wales not adopted a corroboration rule?

Given the perceived significance of corroboration as a safeguard against miscarriages of justice, and the extent to which English law has grappled with the problem of miscarriages, it might be expected that reformers in England and Wales would have seen the Scottish corroboration rule as a ready-made solution to their problems. English law has taken from Scots law in this fashion before. In the Homicide Act 1957, Westminster legislated to introduce the Scottish doctrine of diminished responsibility into English law, remedying a defect in English law whereby the law of homicide had previously failed properly to account for cases where people killed while suffering from impaired mental capacity. Corroboration might have been seen as a similar off-the-shelf solution to a recognised problem, but it was not. Why not? Answers can be found in a variety of English reviews of the problem of miscarriages of justice.

**The Devlin Committee (1976)**

The Devlin Committee was set up in 1974 following two cases of wrongful conviction, with a remit to examine “all aspects of the law and procedure relating to evidence of identification in criminal cases”. The Committee did consider whether there should be a requirement of corroboration in cases of identification, but doubted the value of such a rule. It noted three principal arguments against such a requirement: (a) it could not see how to tailor the rule so as not to cause injustice in cases involving “prolonged or repeated observation” where, it felt, the risk of error was rather less; (b) it felt the requirement would confer effective immunity on many petty offenders; (c) an alleged offender who had been identified by an apparently reliable single witness should be expected to present a defence rather than having the option of making a no case to answer submission at the end of the prosecution case.

**JUSTICE’s 1989 report on miscarriages of justice**

A 1989 report by JUSTICE on Miscarriages of Justice noted calls which had been made for a corroboration requirement in respect of confession evidence (either generally or in certain cases), and “[i]n order to see what effect a requirement of corroboration would have... examined the situation in Scotland”. They suggested that the difference between Scots and English law was “more apparent than real” and that the degree of corroboration required by Scots law was not

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12 Indeed, the 1993 Report of the Royal Commission on Criminal Justice (Cm 2263: 1993) has been seen as a watershed in the treatment of miscarriages of justice in common law jurisdictions: see T Thorp, Miscarriages of Justice (2005) 11.
13 See HC Debs 27 Nov 1956, col 318 (statement of the Attorney-General); HC Debs 15 Nov 1956, col 1153 (statement of the Home Secretary).
15 Paras 4.27-4.42.
16 JUSTICE, Miscarriages of Justice (1989) para 3.21, citing Report of Inquiry into the Circumstances Leading to the Trial of Three Persons on Charges arising out of the Death of Maxwell Confoit and the Fire at 27 Doggett Road, London SE6 (HC90, 1977) paras 2.26-2.29. JUSTICE also examined identification evidence, concluding in this respect that the recommendations of the Devlin Committee (on which, see ch 5) should be given statutory force: para 3.12.
17 Para 3.22.
“high”. They concluded that “corroboration is not necessarily the foolproof safeguard that its proponents suggest”, and that it offered only protection of a “limited nature”.

Despite this scepticism, JUSTICE did recommend that a confession should be inadmissible unless (amongst other things) “the truthfulness of the facts contained in the alleged confession is corroborated by independent evidence of other witnesses”. In part, JUSTICE’s lukewarm evaluation of the Scottish rule was based on the view that it had been “relaxed” so as to diminish the protection which it offered. JUSTICE did not consider whether a different, stronger corroboration rule might be desirable.

**The Runciman Commission (1993)**

In 1991, on the same day that the convictions of the Birmingham Six were quashed, the Home Secretary announced the establishment of a Royal Commission on Criminal Justice, chaired by Viscount Runciman. The Commission had a broad remit “to examine the effectiveness of the criminal justice system in England and Wales in securing the conviction of those guilty of criminal offences and the acquittal of those who are innocent”. It reported in 1993.

The Commission reviewed the arguments for and against a supporting evidence requirement, particularly in the context of confessions. In favour of such a requirement, it noted that (a) there were a number of cases where confessions had been believed by juries but were subsequently found to be false, including both cases of police malpractice and cases where there had been no investigative impropriety; (b) that persons do confess to crimes which they have not committed; (c) that, particularly given the risks associated with such evidence, confessions had “hitherto taken too central a role in police investigations”.

Against such a requirement, it noted (d) that a supporting evidence requirement would hinder cases brought against people “properly convicted on the basis of genuine confessions alone”; (e) that a supporting evidence requirement would affect only a very small percentage of cases, although the absolute number would be high; (f) that a supporting evidence requirement would result in additional acquittals despite some members of the Commission doubting that “the proposed corroboration rule gave significantly greater safeguards against wrong convictions than are now available”; (g) that police decisions not to seek evidence supporting confessions were often “a rational decision to conserve limited resources”; (h) that the law had tended generally to move away from corroboration requirements and (i) that placing too much emphasis on a corroboration requirement would be dangerous, because it might dissuade scrutiny of cases where there were multiple but weak pieces of evidence against the defendant.

A minority of the Commission (three of eleven members) considered that it should not be possible for a conviction to be based upon a confession alone. The majority took a different view, recommending that.

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18Para 3.23.
19Para 3.27.
20Para 3.29.
21Para 3.27.
23Royal Commission on Criminal Justice, Report (Cm 2263: 1993) i.
24Paras 3.65-3.75.
25Para 3.86.
...where a confession is credible and has passed the tests laid down in PACE, the jury should be able to consider it even in the absence of other evidence. Where a confession is not credible we would expect the case to be dropped before it reaches the jury; either the police will not pursue it, or the prosecution review will screen it out, or the judge will direct an acquittal following the reversal of Galbraith or exclude the confession under section 76 or 78 of PACE. We think that a confession which passes all these tests should be left to the jury to consider. We do, however, recommend that the judge should in all cases give a strong warning [about the dangers of convicting on a confession alone].

2.3 Criticisms of the Scottish corroboration rule before Cadder v HM Advocate

Criticisms of the Scottish corroboration rule have, until recently, been rare and intermittent.27 In a short 1943 article, the advocate and barrister C de B Murray attacked the corroboration rule, arguing that “our law of evidence ought, like the Law of England, to prescribe quality, not quantity, in order that the guilty may not escape justice, when the evidence against them is, in the opinion of a jury, at once credible and sufficient”.28 He returned to the point in more detail a few years later:29

...one notes that while the Scottish rule differs from the English, the Scottish writers do not bother to examine it or defend it. It is stated in peremptory form as though it were an axiom of Euclid’s, and to question it, sacrilege. On the other hand, English textbooks on the law of evidence (Best, for example) are not content merely to say that by the law of England one witness, accepted as credible and not contradicted, is enough. They go into the matter both historically and logically. In primitive times proof depended on the number of a man’s witnesses. As the law developed and barbarians became citizens, it was seen that the value of evidence depended not on the number but the character of the witnesses – not quantity, quality. The evidence of one intelligent and honest man is worth more than twenty rogues. Other points I have space barely to indicate: (1) the necessity of having more than one witness is a temptation to commit perjury, or, at any rate, to induce some one else to do so; (2) crime is committed in solitude and darkness, not openly in the light of day and requiring two witnesses is an encouragement to criminals, for if they assault a man in a desolate place where no one else is present, they may escape conviction; (3) a mechanical and rule of thumb method of proof is, in these enlightened days, surely an anachronism.

In 1975, the Select Committee on Violence in Marriage criticised the corroboration rule, stating that in cases of domestic violence it “in practice usually means there must be a witness to the assault other than the woman concerned before a conviction can be obtained”, and recommended that it

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26 Para 3.87, referring to the Police and Criminal Evidence Act 1984. The Commission proposed (at paras 3.41-3.42) reversing R v Galbraith [1981] WLR 1091, so that a trial judge could stop a case if “the prosecution evidence is demonstrably unsafe or unsatisfactory or too weak to be allowed to go to a jury”. This would have been a wider power than that permitted under Galbraith, where it was held that a trial judge should stop a case only if (a) there was no evidence that the defendant committed the offence or (b) taking the prosecution evidence at its highest, a reasonable jury, properly directed, could not properly convict on it. This proposal was not implemented.

27 I D Macphail, Evidence: A Revised Version of a Research Paper on the Law of Evidence in Scotland (1987) para 23.28: “the abolition or relaxation of the requirement of corroboration in criminal cases has seldom been suggested”. The only examples he cites are the papers by C de B Murray noted immediately below.

28 C de B Murray, “Plurality of witnesses” (1943) 59 Scottish LR 141 at 143

29 C de B Murray, “Quality or quantity of evidence” (1946) 62 Scottish LR 249 at 254-255.
be amended in respect of assaults between husband and wife in the matrimonial home.\(^{30}\) The Secretary of State for Scotland and the Lord Advocate undertook to study this recommendation,\(^{31}\) but nothing appears to have come of it. The Scottish Law Commission was later to suggest that the Select Committee’s concerns may have been misconceived.\(^{32}\)

Apprehensions as to the difficulty of obtaining sufficient corroborative evidence of domestic violence may in many cases rest on a misconception of the rule. But we add the rider that it is most important that those concerned with enforcing the law relating to domestic violence should properly understand the nature of the evidence which can constitute corroborative evidence. It has been suggested to us, for example, that there is a widespread belief that evidence cannot be corroborative evidence unless it derives from a second eye witness. It seems to us that it is important to ensure that this notion is dispelled particularly if it is entertained by policemen.

The Scottish Law Commission returned to this topic in its work on the evidence of children and other potentially vulnerable witnesses from 1988 to 1990, noting that there had been moves towards relaxing corroboration requirements in respect of child witnesses in English law. In its discussion paper, however, it rejected the suggestion that Scots law should take a similar path. Corroboration was a general requirement in Scotland, and there could be.\(^{33}\)

...no possible justification for creating a privileged class of case, or a privileged class of witnesses, for which or for whom the normal requirements of corroboration would no longer apply. It may, of course, be argued that child abuse is a particularly objectionable form of criminal behaviour, but that consideration, even if it be right, merely seems to us to strengthen the desirability of ensuring, by retention of the corroboration requirement, that innocent people are unlikely to be wrongly convicted.

In its report, the Commission noted that its view had been “widely accepted” by consultees, and recommended that there should be no exception to the corroboration requirement in respect of child witnesses. It noted, however, that a general corroboration requirement was comparatively unusual, and suggested “it may be that this Scottish rule should be reassessed at some time to see whether its retention, as a general requirement, is justified”.\(^{34}\)

The Commission returned to this issue once again in 2004, when the Scottish Ministers asked it to “examine the law relating to rape and other sexual offences and the evidential requirements for proving such offences and to make recommendations for reform”.\(^{35}\) In its Discussion Paper on Rape and Other Sexual Offences, the Commission noted that the corroboration requirement could be

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\(^{30}\) Report from the Select Committee on Violence in Marriage (HC 553-II, 1975) para 55.


\(^{33}\) Scottish Law Commission, The Evidence of Children and Other Potentially Vulnerable Witnesses (Scot Law Com DP No 75, 1988) para 5.20.

\(^{34}\) Scottish Law Commission, Report on The Evidence of Children and Other Potentially Vulnerable Witnesses (Scot Law Com No 125, 1990) para 3.3.

\(^{35}\) Scottish Law Commission, Discussion Paper on Rape and Other Sexual Offences (Scot Law Com DP No 131, 2006) para 1.1.
"especially problematic" in some cases of sexual assault, and that Scots law was unusual in requiring corroboration. It suggested, however, that this was counterbalanced by the absence of other safeguards from the criminal justice process (in particular, the fact that Scottish jury verdicts need not be unanimous). It asked whether the requirement of corroboration should be removed for proof of sexual offences (and, if so, which ones). Only seven of 52 respondents supported the abolition of corroboration. The Commission summarised the position of those who opposed abolition as follows:

Consultees who opposed abolition of the corroboration requirement gave several reasons for their view. One reason, stressed by many consultees, was the risk of miscarriage of justice if a conviction could proceed on the basis of uncorroborated evidence. A further point was stressed by several groups representing the interests of victims of sexual attacks: allowing convictions in cases where there was no corroborating evidence could result in successful appeals, which in turn might lead to a general perception that all convictions based solely on the word of the complainer are unsound. The overall effect could be to discourage victims from raising allegations that they had been sexually assaulted.

The groups to which the Commission refers here were largely, although not unanimously, opposed to the removal of the requirement of corroboration for sexual offences. While the Central Scotland Rape Crisis and Sexual Abuse Centre suggested that it was “ludicrous” that corroboration was required for conviction of sexual offences, given that it had been removed for civil actions and did not apply to statutory offences of poaching, this was a minority view. The predominant view was that offered by Rape Crisis Scotland, in a submission adopted by a number of other bodies, who argued first, that there was no evidence from other jurisdictions that this would lead to a “significant rise” in convictions; and secondly, “the risk that this development would lead to a general perception that convictions obtained on this basis were unsafe, may put complainers at more of a disadvantage than any resulting benefits would advance their interests”.

The Commission concluded that, if the requirement of corroboration were to be altered or abolished, this should be considered “across the whole range of criminal offences”, and that such a review should not be carried out in isolation of other aspects of the criminal justice system such as

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36 Para 7.16.
37 Para 7.24.
38 Para 7.24.
40 Scottish Law Commission, Report on Rape and Other Sexual Offences (Scot Law Com No 209, 2007) para 6.4 n 1. The reasons which these consultees gave are not recorded in the report. The Commission adds “although some expressed uncertainty”: this presumably means that some of the remaining 45 consultees were uncertain, rather than indicating uncertainty on the part of some of the seven supporting corroboration’s abolition, but this is unclear.
41 Para 6.4.
42 Rape Crisis Scotland’s submission on this point was expressly adopted by the Edinburgh Women’s Rape and Sexual Abuse Centre, SASSIE (Sexual Abuse Survivors Support in Edinburgh) and Scottish Women’s Aid. The Fife Domestic and Sexual Abuse Partnership submitted that corroboration “should remain, considering that a majority verdict is sufficient to convict in Scotland”. Action for Change, Stirling opposed the suggestion that the requirement for corroboration be removed but did not give any reasons for this view. The Women’s Support Project stated that they would “tend to say no” to the suggestion as it “would not necessarily be a solution to addressing the barriers women face, in fact it may even exacerbate the situation for women”.

the simple majority jury verdict. Accordingly, it did not recommend any change to the law of corroboration.

Despite the terms of reference for the Commission’s work, it did not propose any changes to the law of evidence, and no such changes were included in the Sexual Offences (Scotland) Bill. When the Bill was considered by the Justice Committee, a number of those who submitted written evidence to the Scottish Parliament raised concerns about the law relating to sexual history and character evidence, but none mentioned corroboration. This was reflected in the Committee’s report, which sought clarification from the Scottish Government “on what is being done at present on the issues of sexual history and character evidence”, but did not consider corroboration.

2.4 Criticisms of the Scottish corroboration rule following Cadder v HM Advocate

The current debate over corroboration in Scots law is a direct result of the 2010 decision of the Supreme Court in Cadder v HM Advocate and, before that, the 2008 decision of the European Court of Human Rights in Salduz v Turkey. In Salduz, the European court had held that “in order for the right to a fair trial to remain sufficiently ‘practical and effective’ art.6(1) [of the ECHR] requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right”.

The Scottish courts had previously rejected the contention that the European Convention required that suspects detained by the police be permitted access to a lawyer. Post-Salduz, it maintained that position in HM Advocate v McLean, observing that the right to a fair trial was safeguarded by other features of the Scottish criminal justice system – such as corroboration. The Supreme Court’s decision in Cadder overruled McLean. Corroboration could not defeat the right of access to a lawyer identified in Salduz. The right recognised in Salduz existed specifically to protect the right against self-incrimination, meaning that many other safeguards recognised in Scots law were “really beside the point”.

Immediately following Cadder, the Scottish Government introduced emergency legislation into the Scottish Parliament to create a statutory right of access to a lawyer during detention and to address

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43 Para 6.5.
44 Michele Burman; Engender; The Equality and Human Rights Commission; The Lesbian, Gay, Bisexual and Transgender Domestic Abuse Project; Rape Crisis Scotland; Zero Tolerance Scotland.
45 Justice Committee, Stage 1 Report on the Sexual Offences (Scotland) Bill (1st Report, 2009 (Session 3)) para 42.
48 Para 55.
51 See e.g. Cadder at para 50 per Lord Hope: “Much was made, of course, of the rule of Scots law that there must be corroboration of a confession by independent evidence. But there was independent evidence in Salduz. The reasoning in that case offers no prospect of its ruling being held not to apply because any confession must under Scots law be corroborated.”
52 See para 70 per Lord Rodger. See further F Leverick, “The right to legal assistance during detention” (2011) 15 Edin LR 352.
53 Cadder at para 73 per Lord Rodger.
certain consequential issues. On the same day, the government announced a review by Lord Carloway of various aspects of criminal law and practice. The terms of reference of this review included the following:

(b) To consider the implications of the recent decisions, in particular the legal advice prior to and during police questioning, and other developments in the operation of detention of suspects since it was introduced in Scotland in 1980 on the effective investigation and prosecution of crime;

(c) To consider the criminal law of evidence, insofar as there are implications arising from (b) above, in particular the requirement for corroboration and the suspect’s right to silence

As the following sections illustrate, the debate over corroboration, and the reasons suggested for its abolition, have shifted over time following Cadder.

Stage 1: Concerns forming the background to Lord Carloway’s Review

As the terms of reference for the Carloway Review make clear, corroboration was to be considered as part of a general review of criminal law and practice in the light of Cadder, and not because of pre-existing concerns about the rule of corroboration itself. This is consistent with comments made by Lord Rodger in Cadder, suggesting that as a result of that decision “there will need to be changes in both legislation and police and prosecution practice to bring the Scottish system of police questioning into line with the requirements of Strasbourg and to ensure that, overall, any revised scheme is properly balanced and makes for a workable criminal justice system”.

The Cabinet Secretary for Justice returned to this point in the Stage 1 debate on the emergency legislation which followed Cadder, arguing that:

...the scales of justice require to be balanced. When they are changed in one direction, in the interests of the rights of the accused, they require to be balanced in the other direction, in the interests of the rest of our community.

Corroboration was repeatedly mentioned in the debate as an issue for Lord Carloway’s consideration, but without specific criticisms being made of the rule. Instead, it was felt that the rule should be considered as part of the general “balance” to which the Cabinet Secretary had referred. One specific reason for this, it was suggested in newspaper reports, was that “interviews in the presence of a solicitor may be seen substantially as doing away with the need for corroboration”.

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54 Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010. See F Stark, “The consequences of Cadder” (2011) 15 Edin LR 293. The Bill was introduced on 26 October 2010 and passed the following day.
56 Cadder at para 97.
57 Scottish Parliament Official Report, 27 October 2010 col 29557. See also K MacAskill, “Scots law is now at risk”, Express on Sunday, 31 October 2010, noting existing safeguards in Scots law and arguing that the Cadder ruling “disturbed the balance of these checks”.
Stage 2: The case against corroboration made by Lord Carloway

In his report, Lord Carloway rejected the “balancing” approach suggested in the immediate aftermath of Cadder.\(^{59}\)

Concern has been expressed that the Review was commissioned with a view to re-balancing a criminal justice system which had been thrown out of kilter by Cadder. There was some perception that Cadder had tilted the system in favour of the suspect in a criminal investigation and there required to be a re-adjustment by adding weight to the causes of the police and prosecution. The Review has not sought to analyse whether there has been a tilting or not and, in any event, in whose favour the balance has wavered. It has not approached its remit with a view to re-adjusting the system in favour of any particular institution or group of persons.

Lord Carloway noted the suggestion of Gerald Gordon that the corroboration rule could be justified on the basis that it would lead to “less injustice” than choosing to run the risk of making mistakes about the reliability of a single witness,\(^{60}\) and explained his approach to the issue of corroboration as follows:\(^{61}\)

The question, which the Review has asked itself, is whether the requirement is a useful tool for achieving Professor Gordon’s stated purpose in the modern world or whether it is an artificial construct that actually contributes to miscarriages of justice in the broad, rather than appellate, sense. Is corroboration merely a comfort blanket for decision makers; that is, something which does not really assist in making a decision the correct one, but which can be used to justify that decision in objective terms?

Corroboration was, therefore, something to be considered on its own terms: any case against it would be valid even if Salduz or Cadder had never happened. On Lord Carloway’s account, that case had three principal limbs. First, he argued, corroboration did not in fact prevent wrongful convictions; that goal was achieved by the standard of proof beyond reasonable doubt.\(^{62}\) Secondly, it was wrong that the evidence of a single witness could not, if the finder of fact considered it to amount to proof beyond reasonable doubt, result in a conviction.\(^{63}\) Thirdly, the requirement was “frequently misunderstood by lay persons and lawyers, not least judges.”\(^{64}\)

On the basis of these arguments, Lord Carloway concluded that the corroboration requirement was “an archaic rule that has no place in a modern legal system”.\(^{65}\) Two features of Lord Carloway’s argument should be stressed. First, the argument which he presented was not based on the consequences of the decision in Cadder. Secondly, it was not based on any difficulties with prosecuting specific crimes such as sexual offences. It was an entirely general argument, independent of these considerations.

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\(^{59}\) The Carloway Review: Report and Recommendations (2011) para 4.0.6. See also para 7.0.2.
\(^{61}\) Para 7.2.5.
\(^{62}\) Para 7.2.41.
\(^{63}\) Para 7.2.42.
\(^{64}\) Para 7.2.44.
\(^{65}\) Para 7.2.55.
**Stage 3: The case against corroboration made by the Scottish Government**

When the Criminal Justice (Scotland) Bill was introduced into Parliament, the accompanying Policy Memorandum restated the arguments made by Lord Carloway and stated that the Government had been persuaded by them.\(^{66}\)

Over the course of the Bill’s progress, however, the debate shifted to reflect a focus on the difficulties of prosecuting particular crimes. In evidence to the Justice Committee, the Cabinet Secretary for Justice emphasised the difficulty of prosecuting rape and sexual offences, alongside other offences committed against elderly and vulnerable people and children.\(^{67}\) When, during the Stage 1 debate on the Bill, the Cabinet Secretary was asked by one MSP why he was pressing forward with the abolition of corroboration, he responded as follows:\(^{68}\)

> One of our most distinguished judges said that we cannot have a whole category of victims who are routinely denied access to justice. We cannot have those who suffer rape or domestic offences, those who suffer domestic abuse behind closed doors, those who are young, those who are vulnerable and those who are elderly preyed upon, picked upon and routinely denied access to justice...

The voices of brave individuals have been echoed by those of the professionals who see the very personal and devastating impact that the corroboration rule can have in practice – not only our police and prosecutors but groups such as Victim Support Scotland, Rape Crisis Scotland and Scottish Women’s Aid, all of which play such a vital role in supporting the victims of crime.

### 2.5 Corroboration and positive obligations

In June 2011, the Lord Advocate made comments to *The Times* newspaper suggesting that the corroboration rule might place Scotland in violation of the ECHR.\(^{69}\)

> “Very often in rape cases there is a delay in reporting the offence, which means that the opportunity to gather forensic evidence is lost,” he said. “The combined effect of the need for corroboration with the right of suspects to have a lawyer in attendance could leave us in the position of falling foul of human rights law again on the grounds that we might not be meeting the requirement to provide effective sanctions in our system.”

He was quoted to the same effect by *Holyrood* magazine in February 2012,\(^{70}\) while in July 2013, the former Lord Advocate, Elish Angiolini, was quoted expressing similar concerns in a BBC interview.\(^{71}\)

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\(^{66}\) Criminal Justice (Scotland) Bill Policy Memorandum, paras 131-139.


\(^{68}\) Scottish Parliament Official Report 27 February 2014, col 28323. See also Scottish Government, “Reforms needed to protect victims” (news release), 25 February 2014 (“Too many victims of domestic abuse and other crimes committed behind closed doors are being denied their day in court, Justice Secretary Kenny MacAskill warned...”)

\(^{69}\) “Rape convictions will fall without change in the law”, *The Times* 14 June 2011.

\(^{70}\) “Corroboration debate intensifies”, 13 February 2012.

\(^{71}\) BBC News Online, “Scots rape law rule ‘could face European challenge’”, 21 July 2013. As Lord Advocate, in oral evidence to the Justice Committee on the Sexual Offences (Scotland) Bill in 2008, Dame Elish described corroboration as “an important part of our justice system and... a protection against miscarriages of justice”
Despite these high profile interventions by the current and former Lord Advocate, Crown Office has not developed its position beyond this bare assertion that Scotland may be in breach of its human rights obligations. Indeed, its formally expressed position seems to fall short of this claim. The matter was canvassed briefly in the Crown Office response to the Carloway Review’s consultation exercise, which stated:

...the judgement [in Cadder] not only tilted the balance against the police and the prosecution, but presents a significant barrier to effective criminal sanctions for victims. The European Court of Human Rights has in a number of cases recognised the importance of an effective criminal sanction for victims. In the case of Doorson v Netherlands, the Court stated:

“Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled... principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses”

In written evidence to the Scottish Parliament on the Criminal Justice (Scotland) Bill, Crown Office stated that “[t]he importance of effective criminal sanctions has been repeatedly stressed by the European Court of Human Rights”, accompanying the statement with lengthy quotes from a research report on Child Sexual Abuse and Child Pornography in the Court’s Case-Law and the 2005 decision in MC v Bulgaria.

In neither of those documents did Crown Office (in contrast to the public comments of the Lord Advocate) go so far as to claim expressly that the corroboration requirement is or may be in violation of the ECHR, nor did it set out the argument which might be made for reaching this conclusion. It is important, therefore, to identify and evaluate just what that argument might be.

**Positive obligations: the case law of the European Court of Human Rights**

The obvious starting point for any discussion of this issue is MC v Bulgaria. In that case, MC alleged that she had been raped by two men. Criminal proceedings were commenced but terminated, with the District Prosecutor finding “inter alia, that the use of force or threats had not been established beyond reasonable doubt. In particular, no resistance on the applicant’s part or attempts to seek help from others had been established.” In order for a person to be convicted of rape, Bulgarian law required either that the alleged victim had been in a “helpless state”: “circumstances where she

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74 (1996) 22 EHRR 330 at para 70.
78 Para 61.
has no capacity to resist physically owing to disability, old age or illness or because of the use of alcohol, medicines or drugs, or that she had been “compelled by means of force or threats”. The European Court of Human Rights observed “that states have a positive obligation inherent in Arts 3 and 8 of the Convention to enact criminal-law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution”, and went on to say:

...the Court is persuaded that any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual’s sexual autonomy. In accordance with contemporary standards and trends in that area, the Member States’ positive obligations under Arts 3 and 8 of the Convention must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim.

What MC indicates clearly is that where substantive rules of criminal law leave certain non-consensual sexual conduct unpunishable, a violation of the ECHR may result. At one point, it was observed that Scottish cases which suggested it might in some instances not be possible to convict of rape without evidence of the use or threat of force could therefore place Scotland at risk of a violation of the Convention. This is because that approach might effectively introduce a force requirement into the substantive definition of rape. That argument is no longer relevant given the Sexual Offences (Scotland) Act 2009, as the redefinition of rape in that Act superseded the case law concerned.

An argument that the corroboration rule is a potential breach of the Convention is rather different in nature. Unlike MC, where the state was in breach of the Convention because it did not regard certain acts as legally criminal, this would involve an argument that the state’s rules of evidence – not its rules of substantive criminal law – amount to a breach of positive obligations owed to victims of crime.

At first sight, any such argument would run into difficulty because of the “fourth instance doctrine” applied by the European Court of Human Rights. Ashworth, Emmerson and Macdonald summarise this doctrine and one consequence of it as follows:

The Court has held that it is not its function to substitute its own judgment for that of the national courts, or to act as a fourth instance appeal... the Court will not interfere with the findings of fact made by the domestic courts, unless they have drawn arbitrary conclusions from the evidence before them.

The European Court of Human Rights has, as the authors note, emphasised repeatedly that assessment of evidence is “as a general rule” a matter for the national courts. It might be noted,

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79 Para 79.
80 Para 74.
81 Para 153.
82 Para 166.
83 M Redmayne, “Corroboration and sexual offences” 2006 JR 309 at 323.
however, that such assertions normally arise in cases where a convicted person claims that they did not receive a fair trial and that article 6 of the Convention has been breached. A claim based on the state’s positive obligations under articles 3 and 8 is different in nature. As the court noted in MC, the state’s legal framework must “effectively punish” rape. This would seem to leave room for an argument that a rule such as corroboration prevents the criminal law being “effective”. While the court in MC might have rested its decision purely on the substantive letter of the law, it did not, referring to a “rigid approach to the prosecution of sexual offences” and the requirement of certain types of “proof” as the basis for finding that there had been a breach of the Convention.

While this would leave room for an argument that the corroboration rule represents a “rigid approach” to the prosecution of sexual offences and so violates the Convention, such an argument would lack any clear foundation in the case law of the European Court of Human Rights. Case law following on from MC has been concerned largely with the scope of domestic criminal law or failures in evidence gathering, rather than rules of evidence themselves. It is also significant that the Dutch unus testis, nullus testis rule does not appear to have been criticised on the basis of Convention rights. Moreover, as is demonstrated in the next chapter, the law of corroboration is not “rigid” at all, but has developed flexibly to alleviate the problems which it might otherwise pose for the prosecution of such crimes. It is not open to the same criticisms as were made of Bulgarian law and practice in MC.


86 See e.g. CN v United Kingdom (2013) 56 EHRR 34; S v Sweden (2014) 58 EHRR 36.


88 See ch 18.
CHAPTER 3: THE EXISTING LAW OF CORROBORATION

Peter Duff

3.1 Introduction

As a preliminary matter, it is useful to summarise our understanding of the Scottish rule that in criminal cases, corroboration is required for there to be a sufficiency of evidence. At the outset, it should be noted that, following a recommendation by the Scottish Law Commission, the requirement for corroboration in civil cases was abolished by the Civil Evidence (Scotland) Act 1988.¹

No more need be said about this, but it is significant because it represented a major diminution in the importance of corroboration in Scots law. As regards criminal cases, the question of sufficiency is a legal test and the trial judge will uphold a submission of no case to answer unless satisfied that, taking the prosecution case at its highest, there is sufficient evidence to convict. As the foregoing implies, the trial judge must put aside issues of the reliability and credibility of witnesses and must assume that the jury will believe all the evidence advanced by the prosecution. The question is a purely legal one of sufficiency and, in Scotland, any evaluation of the quality of the evidence is irrelevant at this stage.² In a Scottish criminal case, by far the most important aspect of sufficiency is the need for corroboration, namely evidence against the accused from two separate sources. For instance, the testimony of one eyewitness is never sufficient, however credible and reliable that witness appears to be and, similarly, an unsolicited and completely convincing confession by the accused must be supported by independent evidence. In other words, the testimony of one witness must be corroborated by evidence from another source.³ If the judge is satisfied that the corroboration requirement has been met it is for the jury to evaluate the evidence.

The next point to note is that only the “essential” or “crucial” facts need be corroborated.⁴ These comprise the identity of the accused and each element of the actus reus and mens rea.⁵ The nature of a crime often means that several elements need to be corroborated. For example, if the offence is one of obtaining money by fraud, the crucial facts that (1) the representation was made, (2) it was false, (3) the accused knew it was false and (4) payment was induced by it must each be proved by two separate sources.⁶ Evidential facts – “facts which individually establish nothing but from which in conjunction with other such facts, a crucial fact many be inferred”⁷ – do not, however, need to be corroborated. The distinction between “crucial” facts and “evidential” facts causes confusion on

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¹ Scottish Law Commission, Corroboration, Hearsay and Related Matters in Civil Proceedings (Scot Law Com No 100, 1986).
² As stated in M L Ross and J Chalmers, Walker and Walker: The Law of Evidence in Scotland, 3rd edn (2009) para 5.9, “the judge must take the evidence led at its best interpretation for the Crown”.
³ See Ross and Chalmers, Walkers on Evidence (n 2) paras 5.1-5.2; F Davidson, Evidence (2007) paras 15.05-15.09 and 15.25-15.26; and see also P Roberts and A Zuckerman, Criminal Evidence 2nd edn (2010) 665-667.
⁴ Both terms have been used in Scottish criminal cases: see Ross and Chalmers, Walkers on Evidence (n 2) para 5.3 n 14 and F Raitt with E H Keane, Evidence: Principles, Policy and Practice, 2nd edn (2013) para 8.08.
⁵ There has been some debate about the extent to which the mens rea of rape needs to be corroborated but the answer seems to be that since the Sexual Offences (Scotland) Act 2009, it does: see Mutebi v HM Advocate [2013] HCJAC 142. However, where the rape is forcible, the necessary corroboration may be inferred from the complainer’s distress and other surrounding circumstances: Adamson v HM Advocate [2011] HCJAC 26.
⁶ Ross and Chalmers, Walkers on Evidence (n 2) para 5.4.8.
⁷ Para 5.7.1.
In essence, evidential facts are circumstantial evidence and the prosecution case will frequently comprise both direct and indirect or circumstantial evidence, the latter sometimes corroborating the former. For instance, the identification of the accused by one eyewitness may be corroborated by circumstantial evidence emanating from the testimony of another witness. Similarly, the reaction of the accused to the discovery by the police of drugs or a weapon in their car or place of residence can corroborate the fact that they knew the items were there, although the inference which may be drawn from the reaction or lack thereof is highly problematic. The fact that evidential facts need not be corroborated is extremely significant when it comes to purely circumstantial cases because, in theory, two relatively weak pieces of circumstantial evidence may be regarded as satisfying the sufficiency test.

Next, there is the question of what degree of corroboration is required to support the primary evidence, for example, the testimony of an eyewitness to a crime. This issue caused the appeal court some difficulties towards the end of the last century. As Sheldon explains, by the early 1990s corroborative evidence in criminal cases merely had to be consistent with the principal evidence – a relatively low threshold. In the case of Mackie, however, Lord Justice-General Hope stated that corroborative evidence had to be “more consistent” with the evidence of the main witness than with “any competing account”. Subsequently, in Smith v Lees, it was suggested by Lord Justice-General Rodger and two of his colleagues (part of a bench of five judges) that Mackie might well need to be reconsidered at some point in the future. Shortly afterwards, the opportunity arose in Fox when the case was remitted to a bench of five judges in order to permit reconsideration of Mackie. In essence, the court concluded that it did not matter if there was a possible explanation for the potentially corroborating evidence. If such evidence, taken at its highest, could support the incriminating principal testimony, the test for sufficiency was satisfied and the case should be allowed to go to the jury. The proposition that the circumstantial evidence had to be “more consistent” with the direct evidence than any other competing account of the events was firmly rejected. A quick look at the facts of Fox will clarify the above point. The accused was charged with the old Scots offence of clandestine injury, i.e. having sexual intercourse with a sleeping woman. The latter had been put to bed at a party while drunk, having earlier had sexual intercourse with another man, and had woken up to find the accused having intercourse with her. She told the accused to desist and he did. The prosecution sought to use her distress following the incident to corroborate her testimony (at this stage, it should be noted that in sexual offence cases the complainer’s distress can corroborate her version of events, a point to which we will return below). According to the accused, however, she had initially consented to his having intercourse with her from behind but when she turned over and saw his face, she withdrew her consent and asked him to stop (which he did).

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8 For recent examples, see Walker (Ross) v HM Advocate [2013] HCJAC 83 and Dempster v HM Advocate [2012] HCJAC 140.
9 For a recent such case, see Martin or Lees v HM Advocate [2012] HCJAC 57 at paras 12-16.
10 D Sheldon, “Corroboration and relevance: some further thoughts on Fox v HMA and Smith v Lees” 1998 SLT (News) 115. For further discussion, see A Brown, “Two cases on corroboration” 1998 SLT (News) 71.
11 Mackie v HM Advocate 1994 JC 132 at 141.
12 1997 JC 73 at 90 per Lord Rodger, 101-102 per Lord Justice-Clerk Ross and 121-122 per Lord Gill.
13 Fox v HM Advocate 1998 JC 94.
14 At 103-107 per Lord Justice-General Rodger.
15 This would now amount to rape under the Sexual Offences (Scotland) Act 2009 s 1.
According to his version of events, her mistake as to his identity was the cause of her distress, presumably because she initially thought he was the other man. Put briefly, the court’s view was that it was open to the jury to believe either version of events. If they believed the complainer’s account, which was the primary evidence, then *ipso facto* they disbelieved the accused’s story and her distress could corroborate her testimony because it supported it. If they disbelieved the complainer’s account, then that quite simply was the end of the matter because the Crown’s principal evidence disappeared. Thus, the distress did not have to be more consistent with the complainer’s account than that of the accused; it was sufficient that it supported her testimony.

### 3.2 Dock identification

Mistaken identification has frequently been acknowledged as a significant cause of miscarriages of justice. At present, as Davidson explains regarding identification, “corroboration may take the form of eyewitness evidence, or of an eyewitness supported by circumstantial evidence, or exclusively of circumstantial evidence”. It is fair to say that the corroborating evidence need not be particularly strong. In *Ralston v HM Advocate*, Lord Justice-General Emslie summarised the position as follows: “where one starts with an emphatic positive identification by one witness, then very little else is required”. Thus, in *Murphy v HM Advocate*, the second witness picked out the appellant and another man at an identity parade as resembling the person who had carried out a shooting, explaining the resemblance as “just the height and the dark hair colour”. The appeal court held that even though this was “small in amount” it could act as corroboration because it was “consistent” with the primary evidence. In *McCreadie v HM Advocate*, relatively weak DNA evidence surpassed the “relatively modest threshold” required to act as corroboration. The obvious potential of this approach for generating miscarriages of justice in Scotland is exacerbated by the fact that, as was relatively recently confirmed by the Privy Council, a dock identification is admissible even where the witness failed to pick out the accused at an identity parade or, even more controversially, identified a stand-in. Thus, a dock identification can act as either the principal or corroborating evidence of identification, a position which has frequently been criticised. It now appears, however, that the jury must be given a specific direction alerting them to the fact that dock

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16 In *Fox v HM Advocate*, Lord Rodger noted (at 97) that the trial judge had also drawn the jury’s attention to other possible innocent explanations for her distress.

17 For a recent example, see *Adamson v HM Advocate* [2011] HCJAC 26, where the accused had broken down crying when told by his family that his alleged rape of his grand-daughter would not be reported to the police. After it was reported some time later, he was convicted and the appeal court observed that while his reaction was open to two interpretations – relief that a false allegation would go no further or relief that the police would not be informed of a true claim – it was open to the jury to draw the latter inference which could help corroborate the complainer’s testimony; see paras 14-15 per Lord Justice-General Hamilton.

18 See ch 4.

19 Davidson, *Evidence* (n 3) para 15.50.

20 *Ralston v HM Advocate* 1987 SCCR 467 at 472. See also *Mair v HM Advocate* 1997 SLT 817.

21 *Murphy v HM Advocate* 1995 JC 16 at 18.

22 At 19 per Lord Justice-Clerk Ross. For references to further such cases, see Davidson, *Evidence* (n 3) paras 15.50-51 and Ross and Chalmers, *Walkers on Evidence* (n 2) para 5.4.6.


identification lacks the safeguards attendant on an identification parade and the fact that the person identified is sitting in the dock between two custodial officers.\textsuperscript{25}

In \textit{HM Advocate v Gage},\textsuperscript{26} a witness stated shortly after the crime that she did not think she would be able to identify a gunman whose face was partially covered by a scarf and whom she had observed only briefly at the end of her driveway in the dark. However, the witness made a dock identification at the trial, claiming that while “not 100 percent sure” she thought she recognised him by his “scary eyes” which she would never forget.\textsuperscript{27} There was also circumstantial evidence indicating that the accused had played a part in the crime. Following a reference by the Scottish Criminal Cases Review Commission, the appeal court refused to admit expert evidence about the dangers of identification evidence\textsuperscript{28} and was clearly satisfied that the existing safeguards as regards this type of evidence were adequate.\textsuperscript{29} It is fair to say that there was considerable evidence that the accused was one of the two persons involved in the crime, although none of this indicated that he was the one who actually fired the shot.\textsuperscript{30}

\section*{3.3 Similar fact evidence and \textit{Moorov}}

There is no general doctrine of “similar fact evidence” in Scotland although its introduction has, in essence, recently been proposed by the Scottish Law Commission (the “SLC”), which concluded that relevant previous convictions of the accused should be admissible.\textsuperscript{31} In making this recommendation, the SLC took into account Lord Carloway’s proposal to remove the requirement for corroboration and thought that there was no “logical conflict” between the two recommendations.\textsuperscript{32} However, the SLC did observe that, in its view, corroboration “continues to perform a valuable function” and that to abolish it in isolation was to “run a serious risk of unbalancing the system”.\textsuperscript{33} It went on to state that if its proposal were accepted, a “wider range of corroborative material” would be available to the Crown and that consideration might well affect the Government’s and Parliament’s decision on whether to abolish corroboration.\textsuperscript{34} Thus, the SLC was clearly expressing some caution about removing the corroboration requirement in the context of its proposal to allow similar fact evidence, in the form of previous convictions, to be admissible against the accused. Before considering the ramifications of this view, it is necessary to summarise briefly the current position on similar fact evidence, principally to be found in the \textit{Moorov} doctrine, and then to consider the SLC’s proposals in more detail.

\textsuperscript{26} [2011] HCJAC 40.
\textsuperscript{27} At para 7.
\textsuperscript{29} \textit{Gage} at paras 29-30.
\textsuperscript{30} It might have been that he was the “getaway” driver, but in that eventuality he was still guilty of murder on an art and part basis (art and part is the doctrine of joint liability in Scots law).
\textsuperscript{31} Scottish Law Commission, Report on \textit{Similar Fact Evidence and the Moorov Doctrine} (Scot Law Com No 229, 2012). In England, the admissibility of what was often loosely termed “similar fact evidence” is now dealt with under the Criminal Justice Act 2003 s 101.
\textsuperscript{32} Scottish Law Commission, Report on \textit{Similar Fact Evidence and the Moorov Doctrine} (n 31) para 1.25.
\textsuperscript{33} Para 1.24.
\textsuperscript{34} Para 1.26.

Under the Moorov doctrine, where an accused is being tried for two or more similar offences involving different complainers, the account of one complainer may be corroborated by the testimony of one of the other complainers and vice versa. The decision in Moorov established that this device of “cross-corroboration” is permissible as long as there is a sufficient “nexus” or “connection” between the two or more separate offences, allowing the inference to be drawn that each instance formed part of some broader “course of conduct”. In other words, “similar fact evidence” is admissible against the accused in this limited context. It should be noted that Moorov may only be used where the two or more offences are prosecuted simultaneously – thus ruling out the use of previous convictions for similar offences as corroborating evidence. The Moorov doctrine is used primarily in sexual offences, where the judiciary has always been well aware that there are often no witnesses to such crimes other than the victim. It has also been used in respect of other types of offence – for instance, in a case involving two separate attempts to bribe professional footballers – where the circumstances were similar and the time between the offences short. Additionally, the more recent Howden rule allows the identity of the accused as a perpetrator of a crime to be proved by the fact that he or she is charged with committing at least one similar offence, even if there is no other identification evidence linking him or her to the former offence.

It is generally agreed that the scope of the Moorov doctrine has expanded over the years as a result of the courts progressively relaxing the requirement of similarity between the offences. Thus, in Carpenter v Hamilton the appeal court held Moorov could apply between two incidents in a public park where the accused made a suggestive sound – described as a “Hannibal Lecter slither” – to one woman and two months later exposed his penis to another. In his commentary, Gordon noted that the case “generally supports the view that for the purposes of Moorov a sexual offence is a sexual offence irrespective of its details.” Obviously, the weaker the requirement of similarity becomes, the less the protection offered to the accused by corroboration. Similarly, while for decades the courts seemed to apply a three year time limit beyond which Moorov could not operate, more recently they have been at pains to emphasise that there is no such limitation and cross-

35 HM Advocate v Moorov 1930 JC 68. See Ross and Chalmers, Walkers on Evidence (n 2) paras 15.72-15.85.
36 Moorov at 80 per Lord Justice-Clerk Alness.
37 At 73-75 per Lord Justice-General Clyde.
38 At 89 per Lord Sands.
40 See, for instance, Lord Blackburn’s comments in the pre-Moorov case of HM Advocate v McDonald 1928 JC 42 at 44, where he said that it would be “disastrous... in cases of this sort – where necessarily the incidents in which each girl is involved can only be spoken to by the girl herself” if cross-corroboration could not take place.
41 McCudden v HM Advocate 1952 JC 86.
42 Howden v HM Advocate 1994 SCCR 19. See Chalmers and Ross, Walkers on Evidence (n 2) para 5.10.5 and Davidson, Evidence (n 3) paras 15.86-15.88. The relationship between the Moorov doctrine and the Howden rule is problematic but again need not concern us here.
43 See Davidson, Evidence (n 3) para 15.80; Raitt with Keane, Evidence (n 4) para 8.50; Scottish Law Commission, Discussion Paper on Similar Fact Evidence and the Moorov Doctrine (Scot Law Com DP No 145, 2010) paras 5.30 and 5.52. See also the Lord Justice General’s comments in M v HM Advocate [2010] HCJAC 112 at para 4.
44 Carpenter v Hamilton 1994 SCCR 108. See also B v HM Advocate [2008] HCJAC 73.
45 Carpenter v Hamilton at 111.
Corroboration is possible where the time between the offences is longer. The appeal court went far beyond three years in the 2011 case of AK v HM Advocate, upholding the decision of the trial judge to allow Moorov to be applied to two offences which were over 13 years apart, while stressing that the facts were unique.

Thus, whether similar fact evidence may be used against an accused depends not only on the probative value of the evidence but also on the arbitrary factor of whether the charges are being pursued in the same proceedings. It is principally for this reason that the SLC recommended that “similar fact evidence” should become generally admissible, this new rule subsuming both the Moorov doctrine and Howden rule. This would render admissible previous convictions and evidence led at previous acquittals, provided that the offences committed or alleged are of a “similar nature”, as well as evidence of past conduct demonstrating “propensity”.

As noted earlier, we would suggest that this proposal requires re-examination in the light of the removal of the corroboration requirement. The SLC argued that its recommendations “may well result in more guilty people being convicted” but in making this assertion left aside the question of whether, as a corollary, they would increase the danger of an innocent person being convicted. In theory, following the abolition of the corroboration requirement, an accused could be convicted on the basis of no evidence other than a relevant previous conviction, although, in practice, there is unlikely to be a prosecution, far less a conviction, without other supporting evidence. What concerns us is that, rather than requiring the offences to have some elements in common, as the Moorov doctrine presently requires, the SLC defines “similar offences” in very broad categories, for instance: “dishonesty”; “disorder”; and “sexual offences”.

This raises the question as to whether the trial judge, on application by the defence, should have the power to prevent previous convictions from going to the jury if, in brief, their prejudicial effect is likely to outweigh their probative value. In its Discussion Paper, the SLC canvassed this issue but seemed inclined to the view that juries can be trusted to give the appropriate weight to such evidence.

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46 Davidson, Evidence (n 3) paras 15.77-15.79; Raitt with Keane, Evidence (n 4) paras 8.43-8.46; and Scottish Law Commission, Discussion Paper on Similar Fact Evidence and the Moorov Doctrine (n 43) paras. 5.26-5.32.
48 See Duff (n 39) at 165.
50 Para 6.47.
51 Appendix A to the Commission’s report: Criminal Evidence (Scotland) Bill [Draft] s 4(1).
52 Paras 5.55-5.75.
53 See ch 1.3.
55 Cf the English case of R v Straffen [1952] 2 QB 911, where the evidence for a murder conviction comprised the defendant’s previous convictions for two very similar and abnormal murders and his presence in the vicinity, having just escaped from Broadmoor hospital.
56 Scottish Law Commission, Report on Similar Fact Evidence and the Moorov Doctrine (n 31) paras 6.80-6.81 and s 11 of the Commission’s Draft Bill.
57 This was the English common law test for determining whether the judge should allow similar fact evidence to go to the jury (DPP v Boardman [1975] AC 421). It is very similar to the third leg of the test for the admission of evidence of the complainer’s “sexual history” evidence in cases of sexual assault, which requires that the “probative value of the evidence ... is significant and is likely to outweigh any risk of prejudice to the proper administration of justice” (Criminal Procedure (Scotland) Act 1995 s 275(1)(c)).
evidence and thus the judge should have no such discretion.\textsuperscript{58} This was despite the majority of consultees being “firmly of the view that it would be necessary to balance the prejudicial effect of any evidence of previous convictions against its probative value”.\textsuperscript{59} The SLC accepted there was some merit in this opinion, particularly where the previous conviction was for a very serious offence of the type that few people commit, and the current prosecution concerned a less serious offence.\textsuperscript{60} Thus, in a rather complex linguistic formulation, it recommended that the court should assume that such prejudice could occur only when the previous conviction or conduct was “much more serious”\textsuperscript{61} and that the burden would be on the accused to satisfy the court that it would not be “in the interests of justice” for that evidence to be led.\textsuperscript{62} In summary, therefore, under the SLC’s proposals the prosecution can lead evidence of any previous convictions or conduct by the accused in the same broad category as the instant charge and the accused may object to this only when the prior misconduct is much more serious.

The logic underlying this proposal is doubtful, particularly because much of the past conduct falling into the SLC’s broad categories will be of limited or dubious relevance.\textsuperscript{63} For instance, let us take an accused on trial for rape with two previous convictions involving indecent exposure or an accused on trial for armed robbery with multiple past convictions for shoplifting and benefits fraud. The previous convictions are much less serious than the offences for which the accused are on trial and, as things stand, they could be led as evidence by the prosecution without restriction. One might argue that they are of little probative value, simply qualifying as “relevant” because they fit into the respective broad categories defined by the SLC, namely “sexual offences” and “offences of dishonesty”.\textsuperscript{64} Admitting this evidence might be prejudicial in both cases because their probative value is arguably low and the jury might well allocate them too much weight. The SLC suggest that only much more serious previous convictions create this risk but the reverse might well also be true. Further, if the offence currently charged is serious, the “stakes” are much higher for the accused and he or she runs the risk that minor indiscretions in the past will lead to a wrongful conviction leading to a long term of imprisonment. The removal of corroboration creates the risk that an accused could be found guilty by the jury on the basis essentially of nothing more than his past criminal record. As noted above, however,\textsuperscript{65} the SLC’s proposals are not within the remit of this report and no more is said about them here.

\textsuperscript{58} Scottish Law Commission, Discussion Paper on Similar Fact Evidence and the Moorov Doctrine (n 43) paras 7.111-7.133.

\textsuperscript{59} Scottish Law Commission, Report on Similar Fact Evidence and the Moorov Doctrine (n 31) para 5.35.

\textsuperscript{60} Paras 5.36-5.45.

\textsuperscript{61} Para 5.45, recommendation 10.

\textsuperscript{62} Para 7.102, recommendation 26.


\textsuperscript{64} Scottish Law Commission, Report on Similar Fact Evidence and the Moorov Doctrine (n 31) appendix A, Criminal Evidence (Scotland) Bill [Draft] s 11.

\textsuperscript{65} See ch 1.3.
3.4 Distress

Since the decision in *Yates*, almost 40 years ago, the distress of a complainer in a sexual offence case has been allowed to corroborate her testimony when there is no other supporting evidence.\(^{66}\) This occurs mainly in rape cases, where the complainer’s distress may be regarded as circumstantial evidence that she did not consent to the act of intercourse, although the doctrine has been used more recently in cases involving other types of offence, namely, abduction and assault and robbery.\(^{67}\) The thinking of the courts has been that because circumstantial evidence – such as injuries caused to the complainer or her torn clothing – may be used as corroboration of lack of consent where testified to by another witness, the evidence of a third party that the complainer was in a distressed condition shortly after the event in question may also fulfil the same function. The problem with this analysis is obvious: injuries or torn clothing are objectively independent of the complainer whereas her distress is not. It may be argued that distress is feigned. This argument should not be overstated because the complainer may have ripped her own clothes or inflicted injuries on herself or, indeed, her condition may be the result of an unconnected event. In any case, the appeal court dealt with this point directly in *Gracey* and definitively stated that the condition of the complainer, whether it is physical injuries or pure distress, may corroborate lack of consent. It is up to the jury to determine whether the distress is genuine, in which case it may corroborate the complainer’s testimony, or feigned, in which case, obviously it does not.\(^{68}\) This, of course, is consistent with the principle outlined above that in determining whether corroboration potentially exists, the judge must take the prosecution case at its highest. It does not matter that there may be a “competing” account of events with which the circumstantial evidence is equally consistent.\(^{69}\)

It is fair to say that the courts have faced major problems in delineating the precise scope of the distress exception. As well as the problem of other possible reasons for the distress, there are also various cases concerned with the maximum time-gap which may be permitted between the alleged assault and the manifestation of the distress which potentially corroborates the complainer’s testimony.\(^{70}\) However, the most problematic issue has been determining what precisely the complainer’s distress can corroborate, and the appeal court struggled with this issue during the 1990s. Following the decision of a bench of five judges in *Smith v Lees*, which overruled the decision in *Stobo* three years earlier,\(^{71}\) it can now be said safely that while distress can corroborate a complainer’s lack of consent, it cannot corroborate precisely what happened.\(^{72}\) *Smith v Lees* concerned a charge of lewd and libidinous conduct (indecency with a child) by an adult towards a 13-year-old girl which took place in a tent during a camping trip. Another adult gave evidence of the girl’s distress upon leaving the tent and the question was whether this could corroborate her testimony as to what had happened. In the court’s view, the evidence of distress could not tell the jury (or, in summary procedure, the sheriff) “more than that something distressing occurred”.\(^{73}\)

\(^{66}\) *Yates v HM Advocate* 1977 SLT (Notes) 42. See *Smith v Lees* 1997 JC 73 at 81 per Lord Justice-General Rodger.

\(^{67}\) Davidson, *Evidence* (n 3) para 15.40.

\(^{68}\) *Gracey v HM Advocate* 1987 SCCR 260.

\(^{69}\) See the discussion of Fox at the text attached to n 15 above.

\(^{70}\) For references to the relevant cases, see Ross and Chalmers, *Walkers on Evidence* (n 2) para 6.74 and Davidson, *Evidence* (n 3) para 15.48.

\(^{71}\) *Stobo v HM Advocate* 1994 JC 28, where the bench was chaired by Lord Justice-General Hope.

\(^{72}\) *Smith v Lees* 1997 JC 73.

\(^{73}\) At 81 per Lord Justice-General Rodger.
Lord Rodger’s view, there was nothing to corroborate her testimony that the accused had caused her to handle his naked penis rather than, for example, shown her pornographic pictures.⁷⁴ For that matter, Lord Rodger stated, her distress might have been caused by a nightmare. Thus, the conviction was quashed. With the removal of the corroboration requirement, such a conviction would stand, a result many people would regard as correct.⁷⁵ The complainer’s testimony would itself be sufficient proof; the distress would simply be supporting circumstantial evidence.

3.5 Self-corroborating confessions

A confession is regarded as very strong evidence and consequently “very little corroboration is required”.⁷⁶ Consequently, over the years, the concept of a “self-corroborating” confession has developed whereby the information contained in the confession is confirmed by other facts and thus the confession is corroborated by circumstantial evidence. In such cases, two witnesses must testify to the fact that the “self-corroborating” confession was made in order to satisfy the corroboration requirement.⁷⁷ These are sometimes termed “special knowledge” confessions because, at their strongest, the information revealed could have been known only to the perpetrator of the crime.⁷⁸ Usually cited in this context is the case of Manuel, where an alleged murderer revealed where he had buried the deceased’s body and one of her shoes in a field and took the police to the precise locations.⁷⁹ To find corroboration here is unobjectionable because only the killer could have possessed this information but the criteria have been extended to well beyond what can sensibly be justified. First, it does not appear to matter now that the confession contains information which is both consistent and inconsistent with the facts. The judge is entitled to leave the case to the jury to determine whether the consistencies can amount to corroboration of the confession.⁸⁰

Second, it is no longer the case that the confession must reveal anything in the way of “special knowledge” in the true sense. In Wilson, for instance, the information contained in the confession was known to the police, had been shared with the victim’s family and friends, including the accused, and much of it had been disclosed through the media.⁸¹ Nevertheless, it was held that this was sufficient to provide corroboration and therefore that the trial judge had been correct to leave it to the jury to determine whether the accused was aware of these facts because he was the perpetrator or had picked them up from other sources. Thus, the onus seems now to be upon the accused to show how he came by the knowledge if he was not involved in the crime. As Gordon observes, “[s]ince the police are unlikely to accept suggestions in cross-examination that they ‘fed’ the information to the suspect, this seems to mean that the accused is obliged to give evidence if he

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⁷⁴ At 121.
⁷⁵ See e.g. Lord Hope, “Corroboration and distress: some crumbs from under the master’s table”, in J Chalmers, F Leverick and L Farmer (eds), Essays in Criminal Law in Honour of Sir Gerald Gordon (2010) 12 at 13-16.
⁷⁶ Greenshields v HM Advocate 1989 SCCR 637 at 642 per Lord Justice-Clerk Ross. For further references, see Davidson, Evidence (n 3) para 15.64; Ross and Chalmers, Walkers on Evidence (n 2) para 6.9.1.
⁷⁷ Low v HM Advocate 1994 SLT 277. Or, alternatively, two witnesses can testify to separate special knowledge admissions having been made at different times: Murray v HM Advocate [2009] HCJAC 47 at para 42.
⁷⁸ See Ross and Chalmers, Walkers on Evidence (n 2) para 6.9.2.
⁸⁰ Gilmour v HM Advocate 1982 SCCR 590.
⁸¹ Wilson v HM Advocate 1987 JC 50. This case was unsuccessfully referred back to the appeal court by the Scottish Criminal Review Commission: Wilson v HM Advocate [2009] HCJAC 58. See Wilson at paras 68-72 for discussion of the requirements for special knowledge confessions.
wishes the jury not to infer that the source of his knowledge was his participation in the crime”.  

As has been noted by Griffiths, this means that the requirement of corroboration provides very limited protection against police malpractice in terms of either fabricating a confession or “improving” a genuine admission. It is fair to say that the lowering of the criteria required for special knowledge confessions has come in for considerable criticism, both from the judiciary itself and academic commentators. With the abolition of the requirement for corroboration, any confession alone will be sufficient for conviction and consideration of potential safeguards is found elsewhere in this report.

3.6 Related difficulties arising out of corroboration

It is also important to note that the need for corroboration in Scottish criminal cases has contributed to complications in other areas of law. For instance, in Muldoon v Herron, two police officers gave evidence that a witness had identified the accused shortly after the offence, despite the fact that in court she denied that the accused were the culprits. In a controversial decision, which has been followed on subsequent occasions, the appeal court held that the police officers’ testimony was not hearsay and thus could corroborate other evidence of identity. Thus, the rules on hearsay which are problematic enough anyway, have been further complicated, a development which might well not have taken place were it not for the need for corroboration of identity.

Also worth noting is a recent controversy which followed the historic decision of a bench of nine judges in the appeal court to remove the element of force from the definition of rape in Lord Advocate’s Reference (No 1 of 2001). In two subsequent cases, Lord Justice-Clerk Gill suggested obiter that, in the absence of force, the complainer’s distress could not corroborate the accused’s state of mind. Various commentators suggested that this was illogical and Chalmers questioned whether it was necessary to corroborate mens rea at all. In the event, subsequent decisions of the appeal court have held that in such circumstances the complainer’s distress when taken alongside other evidence can potentially corroborate mens rea.

82 2009 SCCR 666 at 707 (para 2).
84 For judicial doubts, albeit obiter, see Lord McCluskey in Smith v Lees 1997 JC 73 at 104 and Lord Coulsfield in Fox v HM Advocate 1998 JC 94 at 118. For academic criticism, see I D Macphail, “Safeguards in the Scottish criminal justice system” [1992] Crim LR 144; Davidson, Evidence (n 3) para 15.67; G H Gordon, “At the mouth of two witnesses: some comments on corroboration”, in R F Hunter (ed), Justice and Crime (1993) 33 at 56-59; Griffiths, Confessions (n 83) paras 5.98-5.104.
86 The decision was that of a Full Bench of five judges. For a detailed discussion of Muldoon v Herron, see P Duff, “The uncertain scope of hearsay in Scots criminal evidence: implied assertions and evidence of prior identification” 2005 JR 1.
87 2002 SLT 466.
88 McKearney v HM Advocate 2004 JC 87 at paras 8 and 16; Cinci v HM Advocate 2004 JC 103 at para 4.
89 J Chalmers, “Distress as corroboration of mens rea” 2004 SLT (News) 141. See also M Redmayne, “Corroboration and sexual offences” 2006 JR 309 at 320-323 and, for general discussion of the point, Davidson, Evidence (n 3) paras 15.43-15.44.
90 See Adamson v HM Advocate [2011] HCJAC 26; Davidson, Evidence (n 3) paras 15.34-15.44.
Third, in DS, where the Privy Council decided that a provision of the Scottish “rape shield” was not inconsistent with the ECHR, Lords Hope and Rodger commented that the accused’s previous conviction for a sexual offence could support but not corroborate evidence that the accused had committed the instant sexual offence. It has been suggested that this is illogical, a view with which the SLC agreed. If the previous conviction is relevant, which the Privy Council determined it was, then there seems no reason why it cannot act as corroboration. This is particularly so because if the earlier event was subject to a “live” charge, rather than a previous conviction, it could potentially corroborate under the Moorov doctrine.

Finally, we have seen that two pieces of circumstantial evidence, each testified to by one witness, are sufficient to provide corroboration of the essential facts if one can infer the latter from the combined testimony of the two witnesses. Indeed, one piece of circumstantial evidence is enough to satisfy the corroboration requirement if it is sufficiently strong. For instance, the accused’s guilt may be inferred from a DNA or fingerprint match as long as evidence of that match is provided by two forensic scientists. This raises an interesting conceptual question, namely precisely what is the source of the evidence in this type of case? It cannot be the fingerprint or DNA itself because there need not necessarily be any other source of evidence (although, in practice, there will usually be some other corroborating circumstantial evidence, e.g. an eyewitness who saw the accused near the crime scene). Therefore, the two independent sources of the evidence are the two expert witnesses who testify to the DNA or fingerprint match. Conceptually, this is logical because the print left at the crime scene tells us nothing; it is the fact, testified to by the two experts, that the print matches that of the accused which is the crucial evidence. In practice, this means that it is not the case, as might be assumed, that corroboration provides a safeguard against an accused being convicted solely on the basis of the analysis of one piece of scientific evidence. It does not.

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91 Under s 275A of the Criminal Procedure (Scotland) Act 1995 (inserted by the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 s 10(4)), if the defence is granted permission to question the complainer about her previous sexual history or character in a rape or similar case, the accused’s previous convictions for a range of sexual offences may be disclosed to the jury. This is very much an exception to the normal rule in Scotland that previous convictions, even for identical offences, are not revealed to the jury.

92 DS v HM Advocate [2007] UKPC D1 at paras 33 and 86 respectively.

93 2007 SCCR 222 at 257 (para 5 of Sir Gerald Gordon’s commentary); P Duff, “‘Similar facts evidence’ in Scots law?” (2008) 12 Edin LR 121 at 125.

94 Scottish Law Commission, Report on Similar Fact Evidence and the Moorov Doctrine (n 31) paras 7.41-7.64.

95 In practice, under s 281 of the Criminal Procedure (Scotland) Act, if the prosecution gives notice, only one of the scientists need attend court unless the accused objects.
CHAPTER 4: CAUSES OF WRONGFUL CONVICTION

Fiona Leverick and James Chalmers

4.1 Clarifying the terminology: wrongful convictions and miscarriages of justice

One difficulty with the claim that the abolition of the corroboration requirement could increase the risk of miscarriages of justice is that the term “miscarriage of justice” is itself used in a variety of different ways. In Scots law, it forms the sole ground of appeal against conviction. Used in that sense, it is an omnibus term encompassing a wide range of possible defects in the original trial process (including a lack of awareness of evidence which only comes to light at a later date) which are regarded in law as justifying the quashing of a criminal conviction.

In more general usage, “miscarriage of justice” can be understood as having one of three overlapping meanings, as follows:

1. **Convictions which are quashed by the appeal court**: as explained above, this is the sense in which “miscarriage of justice” is used as a term of art in Scots law.

2. **The conviction of the factually innocent**: the sense in which most studies of “miscarriages of justice” use the term. Early studies were concerned primarily with cases where innocence had been positively established following conviction; some more recent analyses have not required positive proof of innocence but have treated miscarriages of justice as also encompassing cases where guilt cannot be taken to be reliably established.

3. **The acquittal of the factually guilty**: a use of the term popularised by Tony Blair in 2002 (“It is perhaps the biggest miscarriage of justice in today’s system when the guilty walk away unpunished”), and reflected in the Carloway Report, where it was argued that “miscarriages of justice in the broad, rather than appellate sense” included such cases.

It is important to recognise the different uses of this term. It has been argued that the abolition of the corroboration requirement would not increase the risk of miscarriages of justice of type (1). This may be true, assuming that abolition does not have any consequences which would indirectly increase this risk: for example, a reduction in the quality of investigative practices which increases the likelihood of appeals based on fresh evidence at a later date. However, it is an essentially circular
claim; a statement that changing the rules of a criminal trial will not result in the rules of a criminal trial being breached.\(^8\)

The claim is also irrelevant, because objections to the abolition of the corroboration requirement are not based on any claim about type (1) miscarriages. Instead, they are based on a claim that abolition will risk a greater number of type (2) miscarriages: the wrongful conviction of the factually innocent.

Some progress can be made towards evaluating these objections, and understanding what alternatives to corroboration might meet these fears, by examining what is known about the causes of miscarriages of justice in the type (2) sense. To avoid confusion, we use the term “wrongful conviction” rather than “miscarriage of justice” in the rest of this chapter.

Attempts have been made in some jurisdictions to undertake wide-ranging reviews of the causes of wrongful conviction as part of a general examination of the criminal justice system.\(^9\) Our concerns here are slightly narrower than this. In this chapter, we aim to establish what is known about the causes of wrongful conviction, and which of those causes raise particular concern in the context of the abolition of the requirement for corroboration.

4.2 What do we know about the incidence of wrongful convictions in Scotland?

The short answer to this question is: surprisingly little. It might be assumed that the work of the Scottish Criminal Cases Review Commission would shed light on this, but that would be incorrect. The Commission’s role is not, at least directly, to consider whether or not someone is factually guilty or innocent. That remains the role of the trial court. The Commission’s role, instead, is to identify cases where a defect in the trial process may mean that the verdict of the court cannot be relied upon: a miscarriage of justice in the type (1), or formally legal, sense. While the majority of cases referred to the appeal court by the Commission involve evidence which was not heard at the original proceedings, or a failure by the prosecution to disclose evidence,\(^10\) such cases do not involve either the Commission or the appeal court establishing that the convicted person is factually innocent. That is not the focus of inquiry for the appeal court. Like other common law systems, the Scottish system operates on the basis that it is the trial court’s role to establish guilt or innocence, and that post-conviction review – at least in the normal case – does not involve asking that question a second time. Instead, the question is whether the trial court’s function was properly discharged.

It should be remembered, however, that modern examinations of wrongful convictions have generally been prompted by a small number of high-profile cases which have received significant public attention.\(^11\) In a small jurisdiction such as Scotland, such individual cases or (especially) clusters of cases are statistically less likely to emerge. There is a danger that lawyers in such


\(^9\) See e.g. Thorp, Miscarriages of Justice (n 4) (New Zealand); California Commission on the Fair Administration of Justice, Final Report (2008); Federal/Provincial/Territorial Heads of Prosecutions Subcommittee on the Prevention of Wrongful Convictions, The Path to Justice: Preventing Wrongful Convictions (2011) (Canada, following on from an earlier report in 2005); B L Garrett, Convicting the Innocent: Where Criminal Prosecutions Go Wrong (2011) (US), examining the work of the Innocence Project (www.innocenceproject.org). See also the work of the National Registry of Exonerations in the US, available at www.law.umich.edu/special/exoneration/Pages/about.aspx


\(^11\) Thorp, Miscarriages of Justice (n 4) 11-31.
jurisdictions may therefore assume that their system is somehow more resistant to wrongful conviction, when a more systematic review – such as that carried out by the retired judge Sir Thomas Thorp in New Zealand – would not provide any evidence to support this claim.\(^{12}\)

In 1999, Clive Walker compiled a “catalogue of miscarriage cases” in Scotland,\(^{13}\) and concluded:\(^{14}\)

> These well-documented cases should suffice to suggest that persistent and unresolved miscarriages of justice do occur in Scotland and that the causes broadly correspond to England and Wales.

He was scathing about the Scottish response to concerns about wrongful conviction:\(^{15}\)

> Many Scottish lawyers display a great deal of what might best be described as complacency and at worst blind arrogance about the righteousness of the system.

There has been no systematic analysis of the causes of wrongful conviction in Scotland, and the available evidence on this issue must be drawn primarily from other jurisdictions. For present purposes, however, this is less of a handicap than it might initially appear. This report is concerned not with the risks of wrongful conviction as they currently exist in Scots law (which would be a much broader project) but with the risks of wrongful conviction which would be aggravated by the abolition of the corroboration requirement. In answering that question, it is therefore useful and indeed necessary to consider the evidence available from other jurisdictions where no such requirement exists.

### 4.3 Research into the causes of wrongful convictions

#### The early studies

Historically, there was a distinct reluctance to accept that wrongful conviction was a problem within Anglo-American criminal justice systems. The prevailing attitude of the early 20\(^{th}\) century was encapsulated by these remarks made by the US Justice Learned Hand in *US v Garsson*:\(^{16}\)

> Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve [jurors]. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see. No doubt grand juries err and indictments are calamities to honest men, but we must work with human beings and we can correct such errors only at too large a price. Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.

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\(^{12}\) Thorp, *Miscarriages of Justice* (n 4).


\(^{14}\) At 327.

\(^{15}\) At 352. Gerry Maher and Lord McCluskey were identified as “honourable exceptions”.

\(^{16}\) 291 F 646, 649 (SDNY 1923).
In his comprehensive historical account, MacFarlane identified the earliest attempt to investigate the issue of wrongful conviction as that undertaken by the American Prison Congress Review in 1912. It is “charitable”, MacFarlane states, to describe this as a study, involving as it did simply writing to every prison warden in Canada and the United States and asking if they had personal knowledge of wrongful executions or wrongful “conviction of heinous crime”. All but one of the responses to the first question were in the negative (with the one exception admitting only the possibility). There were a few positive responses to the second question, but these were dismissed by the respondents and the author of the study because in none of these cases was the wrongfully convicted individual considered “a worthy person”.

From the 1930s onwards, a handful of studies started to emerge which challenged the prevailing belief that wrongful conviction was not a problem to which attention should be devoted although, as Thorp notes, they had little or no effect on it. The first of these was published by Edwin Borchard in 1932. Borchard, who has been described as “the originator of wrongful conviction scholarship”, identified 65 cases of wrongful conviction, primarily from the US but also including two English cases and one Scottish case. He suggested that the main causes of wrongful conviction were mistaken eyewitness identification, improperly obtained confessions, unreliable expert evidence, witness perjury and inadequate defence representation, conclusions that have been reflected in almost every subsequent study. He also identified a number of other contributory factors, including public pressure to solve horrific crimes and, in the context of the (Scottish) Oscar Slater case, the majority jury verdict.

Borchard’s seminal study was followed by a handful of similar projects. In 1957, for example, Jerome and Barbara Frank (a US judge and his daughter), in a study of 36 cases of wrongful conviction, supported Borchard’s analysis, stressing in particular the role of mistaken eyewitness testimony. They also identified the use of jailhouse informants as a cause of some of the wrongful convictions in

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18 RH Gault, “Find no unjust hangings” (1912-1913) 3 J of the American Institute of Criminal Law and Criminology 131.
19 MacFarlane (n 17) at 406.
20 Gault (n 18) at 131.
21 Ibid.
22 Gault (n 18) at 132.
23 Thorp, Miscarriages of Justice (n 4) at 5.
26 Borchard (n 24) at 8 (William Hebron) and 86 (Adolf Beck).
27 At 228 (Oscar Slater).
28 At xx.
29 At xiii-xviii.
30 At 234.
31 J Frank and B Frank, Not Guilty (1957).
32 At 132-148.
their sample, foreshadowing modern-day findings. Their conclusions were echoed by Radin in 1964, who attributed a further 80 cases of wrongful conviction to factors including coerced confessions, single eyewitness identification, inadequate disclosure by the prosecution and inadequate defence representation.

All of these studies were relatively small scale and, while remarkably prescient of modern literature in terms of their conclusions, had no real impact. It was not until the 1980s that things began to change, with the publication of what has been described as the “watershed” study of wrongful conviction undertaken by Bedau and Radelet. Their dataset of 350 cases was the largest to date, spanning wrongful convictions that had occurred in capital cases (all rape or homicide) between 1900 and 1985. In 309 of these there was some sort of official recognition of innocence, such as an official pardon. In the others there was other compelling evidence of innocence such as another person subsequently confessing to the crime, or being implicated in it, the statement of a state official or subsequent scholarly consensus on the basis of the available evidence. Like their predecessors, their catalogue of the causes of wrongful conviction included mistaken eyewitness identification, false confessions, witness perjury and prosecution suppression of exculpatory evidence. Echoing Borchard, they also pointed to the contribution made by public pressure for a conviction in cases that had caused community outrage. Bedau and Radelet’s study was also significant because it was the first to point to misleading forensic evidence as a possible cause of wrongful conviction (identifying “erroneous diagnosis of the cause of death” as a factor in 16 of their cases).

The DNA exonerations and the innocence movement

The most significant development in the study of wrongful conviction came in the 1990s, with the emergence of DNA-based exonerations. It was significant for two main reasons. First, it meant that even the most hardened sceptics could no longer deny that wrongful convictions had occurred in at least some cases, even if the scale of the problem could still be disputed. Various scholars have attempted to arrive at a figure for the rate of wrongful conviction, based on the known DNA exoneration cases, although these all contain so many caveats that it is difficult to conclude much from them other than the fact that wrongful conviction definitely happens, there are likely to be

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34 In a similar vein, see E S Gardner, *Court of Last Resort* (1957).
35 Leo (n 17) at 204.
36 H Bedau and M Radelet, “Miscarriages of justice in potentially capital cases” (1987) 40 Stanford LR 21. See also A Rattner, “Convicted but innocent: wrongful conviction and the criminal justice system” (1988) 12 Law and Human Behavior 283, whose study of 205 wrongful convictions was published at around the same time and which reported similar findings.
37 Bedau and Radelet (n 36) at 49.
38 At 57 (table 6).
39 At 62.
40 Zalman describes this as the start of “the age of innocence”: see M Zalman, “An integrated justice model of wrongful convictions” (2010-2011) 74 Albany LR 1465 at 1499.
41 See e.g. D M Risinger, “Innocents convicted: an empirically justified factual wrongful conviction rate” (2007) 97 J of Criminal Law and Criminology 761 at 778 (who arrives at a figure of 3.3% for capital rape-murders in the US); S Gross, “How many false convictions are there? How many exonerations are there?”, in Huff and Killias, *Wrongful Convictions and Miscarriages of Justice* (n 24) at 45 (concluding that at least 1.5% of those sentenced to death in the US were factually innocent).
some cases in which it remains undiscovered\(^{42}\) and that the true rate of wrongful conviction cannot be known for sure.\(^{43}\)

Second, it led to increasing attention being devoted to tackling the problem, both in terms of identifying the causes of wrongful conviction and identifying reforms that might address these, a debate that continues to the present day.\(^{44}\) A series of broad enquiries started to take place, many of which centred around the death penalty in the US. In Illinois, for example, following the release of 13 wrongfully convicted prisoners from death row, the Governor (who was a strong death penalty supporter) imposed a moratorium on capital punishment in January 2000 and appointed a commission to investigate the causes of wrongful conviction in March of that year.\(^{45}\) The Commission’s subsequent report identified particular concerns including the uncorroborated evidence of in-custody informers, false confessions, and unreliable eyewitness evidence.\(^{46}\) Most significant, however, were the studies stemming from the birth of the modern day innocence movement,\(^{47}\) a collection of mostly university based innocence projects devoted to identifying and rectifying wrongful convictions. The most notable is the Innocence Project,\(^{48}\) founded in 1992 and based at Cardozo Law School.\(^{49}\) Its focus is purely on DNA-based exoneration and, at the time of writing, it had identified 316 such cases in the US.\(^{50}\) It maintains a database of DNA exonerations and this has spawned a number of research projects investigating the causes of wrongful conviction, the most substantial of which has been undertaken by Garrett.\(^{51}\) His study was based on the first 250 DNA exonerations and, for each of these, the vast majority of which were cases of murder and/or rape,\(^{52}\) Garrett examined case files, trial transcripts, police reports and other court documents in order to identify the evidence on which the conviction was based.\(^{53}\)

\(^{42}\) The DNA exonerations are often referred to as “the tip of an iceberg”. See e.g. K Roach, “Wrongful convictions in Canada” (2011-2012) 80 University of Cincinnati LR 1465 at 1470; Garrett, Convicting the Innocent (n 9) at 262; K A Findley and M S Scott, “The multiple dimensions of tunnel vision in criminal cases” (2006) 2 Wisconsin LR 291 at 291.

\(^{43}\) See Gross (n 41) at 46; Risinger (n 41) at 788; Garrett, Convicting the Innocent (n 9) 264.

\(^{44}\) Thorp (n 4) at 5; D Givelber, “Kalven and Zeisel in the twenty-first century: is the jury still the defendant’s friend?”, in C J Ogletree and A Sarat (eds), When Law Fails: Making Sense of Miscarriages of Justice (2009) 140 at 141.

\(^{45}\) MacFarlane (n 17) at 432; C J Ogletree and A Sarat, “Introduction”, in Ogletree and A Sarat (eds), When Law Fails (n 44) 1 at 2-3.


\(^{47}\) For a comprehensive account of its history and development, see Zalman (n 40).

\(^{48}\) http://www.innocenceproject.org/.

\(^{49}\) There is a detailed account of the history of the Innocence Project in B Scheck, P Neufeld and J Dwyer, Actual Innocence (2001).

\(^{50}\) Correct as of 15 April 2014: the cases are listed at http://www.innocenceproject.org/know/Browse-Profiles.php.

\(^{51}\) B L Garrett, Convicting the Innocent (n 9). A shorter summary of his findings can be found in B L Garrett, “Trial and error”, in Huff and Killias (eds), Wrongful Convictions and Miscarriages of Justice (n 24) at 77. An earlier study, based on the first 200 exonerations, is reported in B L Garrett, “Judging innocence” (2008) 108 Columbia LR 55. Others have analysed the Innocence Project data (see e.g. R K Little, “Addressing the evidentiary sources of wrongful convictions: categorical exclusion of evidence in capital statutes” (2008) 37 Southwestern University LR 965) but Garrett’s study is by far the most extensive.

\(^{52}\) There were 171 rape cases (68%), 22 murder cases (9%) and 52 rape/murders (21%). The remaining five exonerees were convicted of other offences, mostly robbery: Garrett, Convicting the Innocent (n 9) at 5.

\(^{53}\) Ibid.
Of equal significance in research terms is the National Registry of Exonerations (NRE), a joint project of the University of Michigan Law School and the Center on Wrongful Convictions at Northwestern University School of Law. Unlike the Innocence Project, the NRE does not itself investigate cases of wrongful conviction but instead aims to provide a comprehensive record of all exonerations in the US since 1989. At the time of writing, it noted 1,350 known exonerations. A major research project based on this dataset reported in 2012, examining the causes of the first 873 exonerations (those registered from January 1989 to February 2012). The dataset on which the NRE report is based is wider than that of Garrett/the Innocence Project because the NRE does not limit itself to DNA-based exonerations. In addition to these, it encompasses cases where pardons were granted or where criminal charges were dismissed at the prosecutor’s motion after new evidence of innocence emerged, acquittals at retrials, a small number of “certificates of innocence” issued by courts and some posthumous exonerations. As such it covers a broader range of offences than the Innocence Project, although the majority are still cases of homicide or sexual assault.

The insights offered by these studies are remarkably similar to those offered by Borchard in his 1932 work. To take the Innocence Project dataset first, Garrett examined the evidence that supported conviction in each of the first 250 exonerations. His findings are displayed in table 1 below.

Table 1: Evidence supporting wrongful conviction (Innocence Project/Garrett study)

<table>
<thead>
<tr>
<th>Type of evidence</th>
<th>Number of cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Eyewitness evidence</td>
<td>190 (76%)</td>
</tr>
<tr>
<td>Forensic evidence</td>
<td>185 (74%)</td>
</tr>
<tr>
<td>Informant evidence</td>
<td>52 (21%)</td>
</tr>
<tr>
<td>Confession evidence</td>
<td>40 (16%)</td>
</tr>
</tbody>
</table>

54 www.law.umich.edu/special/exoneration/Pages/about.aspx
55 Correct as of 15 April 2014: the cases are listed at http://www.law.umich.edu/special/exoneration/Pages/browse.aspx
57 At 1.
58 In Gross and Shaffer’s report, these accounted for only 37 per cent of exonerations: Gross and Shaffer, Exonerations in the United States (n 56) 8.
59 Ibid.
60 In the Gross and Shaffer study, there were 406 cases of homicide, 203 cases of sexual assault (including rape), 102 cases of child sex abuse, 47 cases of robbery; 58 cases of other violent crimes (such as attempted murder, assault and arson); and 58 cases of non-violent crimes (such as drug crime, fraud type offences and theft): at 20 (table 2).
61 Ibid at 20.
62 Garrett, Convicting the Innocent (n 9) at 279. His analysis has been criticised in the respect that merely identifying that a particular type of evidence was used in a wrongful conviction case does not tell us anything about the degree of influence that such evidence had on the outcome: see S A Cole and W C Thompson, “Forensic science and wrongful convictions”, in Huff and Killias, Wrongful Convictions and Miscarriages of Justice (n 24) at 118.
As table 1 shows, there were four main types of problematic evidence that had supported the wrongful convictions: eyewitness evidence, forensic evidence, evidence of informants (a category encompassing jailhouse informants, co-defendant testimony and other witnesses who had something material to gain from offering information) and confession evidence. Garrett also identified a number of wider contributory factors, most notably “ineffective assistance of [defence] counsel”, public pressure to solve notorious cases, prosecutorial and police misconduct and tunnel vision/cognitive bias. He did not attempt to quantify the number of wrongful convictions in which these played a role, but referred to them as “systemic” factors, affecting many of the cases in his sample.

The findings of the Gross and Shaffer study are shown in table 2.

<table>
<thead>
<tr>
<th>Contributory factor</th>
<th>Number of cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Perjury/false accusation</td>
<td>445 (51%)</td>
</tr>
<tr>
<td>Mistaken eyewitness identification</td>
<td>375 (43%)</td>
</tr>
<tr>
<td>Official misconduct</td>
<td>368 (42%)</td>
</tr>
<tr>
<td>False or misleading forensic evidence</td>
<td>210 (24%)</td>
</tr>
<tr>
<td>False confession</td>
<td>135 (15%)</td>
</tr>
</tbody>
</table>

Although their classification scheme is slightly different to Garrett’s, there are some major similarities between the two studies. Like Garrett, they identify mistaken eyewitness identification, false confessions and misleading forensic evidence as significant causes of wrongful conviction. Their figures for the proportion of cases involving eyewitness evidence are lower than those of Garrett (43 per cent compared to 76 per cent), but this is due to two factors. First, unlike Garrett, they attempted to distinguish between genuine mistakes and deliberate misidentifications and classified the latter as “perjury”. Second, as noted above, a wider range of cases are included in the NRE compared to the Innocence Project (the former focuses on exonerations generally, the latter only on DNA-based exoneration). Identification was more likely to be at issue in Garrett’s sample, which comprised mainly murders and “stranger” rapes (and it is worth noting that where these types of case appeared in the Gross and Shaffer sample, the proportion of cases involving mistaken

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63 Cases where a cellmate of the defendant claimed the defendant had confessed to him or her.
64 Garrett, *Convicting the Innocent* (n 9) 165-167.
65 At 150.
66 At 167-170.
67 At 265-268. He also discussed (150-153) the role of guilty pleas (and the incentives offered to induce them), but this lies outwith the scope of our study.
68 At 265.
69 Derived from Gross and Shaffer, *Exonerations in the United States* (n 56) 40 (table 13).
70 At 43.
identification was far higher).\textsuperscript{71} Indeed, as Gross and Shaffer themselves state, for the DNA exonerations in their sample, their figures for mistaken eyewitness identification are much closer to those of Garrett.\textsuperscript{72}

There are some other minor differences between the two studies. Gross and Shaffer's category of perjury/false accusation is broader than Garrett's category of informant evidence. It encompasses informant evidence and the evidence of accomplices, but it also includes other false accusations, such as claims by a complainant that a criminal act had taken place when it had not, and, as noted above, all deliberate misidentifications.\textsuperscript{73} The greater representation of perjury/false accusations compared to Garrett's research may also be due in part to the wider sample of cases included in the NRE. Gross and Shaffer's dataset included 102 cases of "child sex abuse",\textsuperscript{74} a category that was absent from Garrett's sample and there was a false allegation in 74 per cent of the child sex abuse cases that ended in a wrongful conviction.\textsuperscript{75} As Gross and Shaffer state, these were "usually produced by pressure on the children from relatives, police officers or therapists; they generally unravel[ed] when the witnesses recant[ed]".\textsuperscript{76}

Finally, unlike Garrett, who merely identified it as a relevant factor at play, Gross and Shaffer attempted to quantify the number of cases in which official misconduct played a contributory role, concluding that this was a cause of 42 per cent of the wrongful convictions in their sample.\textsuperscript{77} Official misconduct encompassed "a broad category of behaviors that affect the evidence that's available in court, and the context in which that evidence is seen".\textsuperscript{78} It included "flagrantly abusive investigative practices", "committing or procuring perjury", "torture", "threats or other highly coercive interrogations", "threatening or lying to eyewitnesses" and "forensic fraud".\textsuperscript{79} At the extreme end, it included "framing innocent suspects for crimes that never occurred" and "concealing exculpatory evidence from the defendant and the court".\textsuperscript{80} Like Garrett, they also noted the role played by defence representation, pointing to "clear evidence of severely inadequate legal defence"\textsuperscript{81} in 104 exonerations, but they could not produce even a reasonable estimate of the overall figure and so did not include it in their data.\textsuperscript{82}

The issues identified by Garrett and by Gross and Shaffer will be discussed in more detail shortly, to the extent that they are relevant to the terms of reference of this research.

\textsuperscript{71} In sexual assault cases, for example, the figure was 80%. In robbery cases, it was 81% (at 40 (table 13)).
\textsuperscript{72} At 51 n 75.
\textsuperscript{73} At 50.
\textsuperscript{74} At 40.
\textsuperscript{75} At 40 (table 13).
\textsuperscript{76} At 51.
\textsuperscript{77} Which they suggest (at 41) is probably an underestimate.
\textsuperscript{78} Gross and Shaffer (n 56) at 66.
\textsuperscript{79} Ibid.
\textsuperscript{80} Ibid.
\textsuperscript{81} At 42.
\textsuperscript{82} At 43.
The limitations of the US exoneration research

The Garrett and Gross and Shaffer studies do suffer from a number of limitations which might affect the extent to which their conclusions can be generalised. For a start (and most obviously), they are both based on the US. As we will see shortly this is not especially problematic, given that the findings of studies from other jurisdictions have tended to reach the same conclusions about the causes, even if not the rate, of wrongful conviction. They are also limited in terms of the type of offences they examined and the date at which the wrongful conviction occurred. For Garrett, his sample comprises almost exclusively rapes and/or murders where the perpetrator was unknown to the victim and where the defendant was convicted after a trial in the 1970s or 1980s. Gross and Shaffer’s sample has a similar profile in terms of the date of conviction. As it was not based purely on DNA exonerations, it is slightly wider in terms of the categories of offence it contains, but it is still limited to mainly homicides and sexual assaults (and a handful of other serious offences). As Gross and Shaffer note, we know very little about the incidence and causes of wrongful conviction for less serious crimes and those in which DNA evidence is unavailable.

These are not limitations, though, that are of any great concern for our purposes. It may be that some causes are over-represented or under-represented in the US exoneration research, but there is no reason to believe that the causes that these studies have identified never occur in other contexts. The main point here is not the numbers, but the identification of potential contributory factors that may have some significance in Scotland post-corroboration.

Research outside the US context

There have, in the various common law jurisdictions, been major reviews of the causes of wrongful conviction but few of these have undertaken any extensive empirical research. Instead they have tended for the most part to focus on the lessons that can be learned from a single case (or small number of cases) or to draw on the findings of the Innocence Project or the NRE. In Canada, for example, there have been no less than nine major enquiries into wrongful conviction. Six were sparked by individual cases and focused primarily on the lessons that could be learned from the case concerned. One was an investigation of forensic paediatric pathology services in Ontario following

83 These are discussed by the authors of the studies: see Garrett, Convicting the Innocent (n 9) 81; Gross and Shaffer, Exonerations in the United States (n 56) 10-17. See also K A Findley, “Defining Innocence” (2010-2011) 74 Albany LR 1157 at 1167; Cole and Thompson (n 62) at 116-118.
84 Garrett, Convicting the Innocent (n 9) at 265.
85 Gross and Shaffer do not provide the date of the convictions in their report, but information can be found on the NRE website: http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx
86 Gross and Shaffer, Exonerations in the United States (n 56) at 5.
87 The relative contribution of forensic evidence and identification evidence is likely to be over-represented: see Garrett, Convicting the Innocent (n 9) at 81.
88 MacFarlane (n 17) discusses three of these in detail (at 421-431). The other six had yet to report when he wrote his article.
a number of wrongful convictions caused by evidence given by a particular expert witness.\textsuperscript{90} The other two were broader reviews undertaken by the Federal/Provincial/Territorial (FPT) Heads of Prosecutions Committee Working Group, which culminated in reports in 2005\textsuperscript{91} and 2011,\textsuperscript{92} but neither undertook any empirical investigation of the causes of wrongful conviction, preferring instead to take these as given and focus on ways to best address the problems concerned. As such, the 2011 Report lists mistaken eyewitness identification and testimony, false confessions, in-custody informers, DNA evidence, forensic evidence and expert testimony, tunnel vision and education as “issues that have been identified time and time again ...as the key factors that contribute to wrongful convictions”.\textsuperscript{93}

In Australia there have also been a number of public enquiries, each following a specific case of wrongful conviction,\textsuperscript{94} but none identified any issues that have not already been thoroughly canvassed above.\textsuperscript{95} In New Zealand, a Royal Commission established to investigate a single case of wrongful conviction\textsuperscript{96} identified police misconduct and a lack of neutrality from a scientific witness as causal factors.\textsuperscript{97} A more wide ranging enquiry was undertaken in New Zealand in 2005 by Sir Thomas Thorp, a former High Court judge who, following retirement, was asked by the New Zealand Ministry of Justice to investigate the causes of wrongful conviction.\textsuperscript{98} He examined the files relating to 70 claims of “miscarriages of justice”\textsuperscript{99} received and assessed by the Ministry of Justice between 1995-2002,\textsuperscript{100} most of which were convictions for murder, rape or serious assault.\textsuperscript{101} It is worth making a brief comment here about terminology. Thorp draws on a database of alleged “miscarriages of justice” in the type (1) sense, as making a claim to the Ministry does not in itself indicate that the claimant is factually innocent. His study is worth noting, nonetheless, because his findings were broadly in line with the US studies, in that the three most common application grounds were newly discovered evidence, police or prosecutorial misconduct (including the non-

\textsuperscript{93} At 3.
\textsuperscript{95} For discussion, see MacFarlane (n 17) at 415.
\textsuperscript{96} The Hon RL Taylor, \textit{Report of Royal Commission to Inquire into the Circumstances of the Convictions of Arthur Allan Thomas for the Murders of David Harvey Crewe and Jeanette Leonore Crewe} (1980).
\textsuperscript{97} At 96-98.
\textsuperscript{98} Thorp, \textit{Miscarriages of Justice} (n 4).
\textsuperscript{99} At 51.
\textsuperscript{100} In New Zealand any convicted person can, after the appeals process has been exhausted, apply to the Ministry of Justice (acting on behalf of the Governor-General) and request he exercise the prerogative of mercy and either quash the conviction or refer it back to the courts: see the discussion in Thorp, \textit{Miscarriages of Justice} (n 4) 49-51. The system is similar to that which existed in England and Wales and in Scotland prior to the establishment of the Criminal Cases Review Commissions in these jurisdictions.
\textsuperscript{101} Thorp, \textit{Miscarriages of Justice} (n 4) 53.
disclosure of evidence) and incompetence of counsel. Less common but still significant were claims alleging witness perjury and faulty eyewitness identification of the accused.\(^{(102)}\)

In England and Wales, empirical research into the causes of wrongful conviction is also rare. The most extensive study to date was undertaken in 1973 by Brandon and Davies.\(^{(103)}\) The authors reviewed 70 cases where it had been “proved”\(^{(104)}\) that someone had been wrongfully convicted and imprisoned, proof being on the basis that a free pardon had been granted (52 cases) or that the Home Secretary had referred the case to the Court of Appeal and the conviction had been quashed (18 cases), excluding “those cases where the basis of the pardon or referral was simply a legal technicality”.\(^{(105)}\) They identified the main causes of wrongful conviction as “unsatisfactory identification, particularly by confrontation between the accused and the witness”, false confessions, the failure to disclose exculpatory evidence, witness perjury, “especially in cases involving sexual or quasi-sexual offences”, badly-conducted defences and “criminals as witnesses”.\(^{(106)}\) Various studies have investigated the bases of successful appeals against conviction in England and Wales\(^{(107)}\) or the grounds on which cases have been referred by the Criminal Cases Review Commission,\(^{(108)}\) but like Thorp’s research in the New Zealand context, they suffer from the obvious limitation that a successful appeal or Commission referral is not necessarily an indication of factual innocence. Aside from this, studies have been limited to summarizing existing research and/or presenting anecdotal evidence,\(^{(109)}\) or, as in Canada, Australia and New Zealand, drawing conclusions from individual cases (most commonly those where defendants were wrongfully convicted of terrorism related offences).\(^{(110)}\) Most importantly for present purposes, no additional insights stem from any of these sources that are not covered by the Innocence Project and the NRE studies.

There is also a small body of literature in the English language that examines the causes of wrongful conviction in continental jurisdictions. Chrisje Brants, for example, has examined a small number of

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\(^{(102)}\) Ibid.


\(^{(104)}\) Brandon and Davies, *Wrongful Imprisonment* (n 103) 19.

\(^{(105)}\) At 19.

\(^{(106)}\) At 21.

\(^{(107)}\) See e.g. M Naughton, *The Innocent and the Criminal Justice System* (n 3).


\(^{(109)}\) See e.g. JUSTICE, *Miscarriages of Justice* (1989), noting “five common threads through most of the allegations made over the years” as being “(a) wrongful identification; (b) false confession; (c) perjury by a co-accused and/or other witnesses; (d) police misconduct, usually in the allegation of a verbal confession[s] on which, it is claimed, was never made, or the planting of incriminating evidence; (e) bad trial tactics” (para 1.7).

high profile cases of wrongful conviction that have occurred in the Netherlands.\textsuperscript{111} The factors she identified as having contributed to these are familiar ones: false confessions, misleading scientific evidence and mistaken identification.\textsuperscript{112} Like Garrett, she also highlights the role played by cognitive bias and tunnel vision.\textsuperscript{113} Once again the most important point for present purposes is that research undertaken in continental jurisdictions, insofar as details are available in the English language,\textsuperscript{114} does not appear to yield any insights additional to those already discussed.

4.4 Conclusion

The first point to note from the discussion above is that wrongful convictions definitely happen, contrary to historic doubts about this. The rate at which they occur is still open to debate (and it may be – indeed it is likely – that the US figures cannot be extrapolated to the Scottish context) but wrongful conviction is a very real danger to which the criminal justice system should be alert. The second point to note is the remarkable consistency in the findings of studies into the causes of wrongful conviction.\textsuperscript{115} Our interest is primarily in the evidential causes of wrongful conviction and, based on the survey undertaken in the previous section, we can now identify these as eyewitness misidentification; lying witnesses who, for want of a better description, “have something to gain” from their lies (including but not limited to so-called “jailhouse informers” and accomplices); false confessions; and unreliable forensic evidence.

Aside from these evidential causes, there are a number of wider environmental and cognitive factors at play.\textsuperscript{116} Relevant environmental factors (or as MacFarlane puts it “predisposing circumstances”\textsuperscript{117}) include inadequate defence representation; public pressure to convict in serious high profile cases; and, “a local legal environment that has converted the legal process into a ‘game’, with the result that the pursuit of the truth has surrendered to strategies, maneuvering and a desire to win at virtually any cost”.\textsuperscript{118} To these can be added a number of well-documented (at least in the psychological literature) human cognitive biases,\textsuperscript{119} such as confirmation bias,\textsuperscript{120} hindsight bias\textsuperscript{121}

\textsuperscript{111} C Brants, “Tunnel vision, belief perseverance and bias confirmation: only human?”, in Huff and Killias (eds), \textit{Wrongful Convictions and Miscarriages of Justice} (n 24) at 161; C Brants, “The vulnerability of Dutch criminal procedure to wrongful conviction”, in Huff and M Killias, \textit{Wrongful Conviction} (n 110) at 157.
\textsuperscript{112} Brants, “Tunnel vision” (n 111) at 171-174.
\textsuperscript{113} At 177-178.
\textsuperscript{114} Aside from the Netherlands, see G Gillieron, “Wrongful convictions in Switzerland: a problem of summary proceedings” (2011-2012) 80 University of Cincinnatti LR 1145; M Killias, “Errors occur everywhere – but not at the same frequency: the role of procedural systems in wrongful convictions”, in Huff and Killias (eds), \textit{Wrongful Convictions and Miscarriages of Justice} (n 24) at 61 (continental Europe generally); and Huff and M Killias (eds), \textit{Wrongful Conviction} (n 110) (chapter on Switzerland at 139-136, Germany at 213-248, France at 249-262 and Poland at 273-286).
\textsuperscript{115} A point noted by many of the leading contributors: see e.g. Leo (n 17) at 212 (noting the “unified voice” of the literature); Roach (n 112) at 393 (noting the “remarkable consensus”); Thorp, \textit{Miscarriages of Justice} (n 4) 73 (noting that the “degree of commonality” between the studies is “significant”); MacFarlane (n 17) at 406 (noting that “the patterns and trends that emerge from [studies of wrongful conviction] are both chilling and disconcerting”).
\textsuperscript{116} The wrongful conviction scholarship has sometimes been criticised for focusing on the evidential causes to the detriment of these wider systemic issues: see e.g. Leo (n 17) at 213; Zalman (n 40) at 1503.
\textsuperscript{117} MacFarlane (n 17) at 436.
\textsuperscript{118} Ibid.
\textsuperscript{119} The leading paper on this subject is Findley and Scott (n 42). See also Brants, “Tunnel vision” (n 111).
\textsuperscript{120} Discussed by Findley and Scott (n 42) (citing the relevant psychological studies) at 309-316.
and outcome bias, which all lead to tunnel vision: the danger that criminal justice professionals do not view evidence objectively once they have formed a view about the guilt of a particular suspect. It is also worth noting that wrongful convictions rarely have a single cause. As MacFarlane states, often “multiple causes interact in a single case, and fuel each other into a wrongful conviction”. Our concern here is with those risks of wrongful conviction which might be aggravated by the abolition of the corroboration requirement. As such, we are interested primarily in the evidential, rather than the environmental, factors noted above (while still recognising that environmental factors might interact with these). Of particular concern are the issues of mistaken eyewitness identification, false confessions and the evidence of informers and accomplices. As such, each will be discussed in subsequent chapters of the report.

121 At 317-319.
122 At 319-321.
123 MacFarlane (n 17) at 444.
CHAPTER 5: EYEWITNESS IDENTIFICATION EVIDENCE

Pamela R Ferguson

5.1 Introduction

Identification of the accused is not always at issue in a criminal trial: in a case involving an alleged assault an accused may accept that she punched the complainer, but contend that this was self-defence; in a case involving an alleged rape an accused may accept that he had sexual intercourse but contend that the complainer consented. Often, however, identification of the accused as the perpetrator of the crime is contested. That accused and perpetrator are synonymous may be established by the prosecution by several means, such as fingerprint or DNA evidence, voice identification, and/or eyewitness identification. This chapter focusses on the last of these as eyewitness identification evidence is fraught with difficulties, and, as chapter 4 demonstrated, the potential for wrongful convictions is high. This chapter describes the approach currently taken in Scotland; outlines the inherent dangers of such evidence; assesses the safeguards which other jurisdictions employ to minimise these dangers, drawing comparisons with the Scottish approach; and makes recommendations for changes to Scots law.

A distinction must be made between pre-trial identification, and identification at the trial itself. The former may occur where a witness to a crime points out the perpetrator to the police during or in the immediate aftermath of the crime. More commonly, pre-trial identification takes place at a later date, during a formal procedure organised by the police, at which the witness is given the opportunity to attempt recognition of the perpetrator from a range of stand-ins or “foils” in an identification parade. Identification at trial is known as “dock identification” or, in some American states, “in-court” identification. The Scottish procedures for both pre-trial and dock identifications are described in more detail, below.

A legal system may adopt a range of approaches to eyewitness identification evidence. It could require supporting evidence/corroboration of eyewitness identification; it could permit only pre-trial identifications, and insist that these meet stringent standards designed to ensure a high degree of accuracy; or it could permit dock identification, with or without there having been a positive pre-trial identification. It could employ particular safeguards, such as judicial directions to juries, judicial training on the dangers of eyewitness identification evidence, or the admission of expert testimony on such dangers. As we shall see below, few of these safeguards apply in Scotland, the corroboration

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1 I am grateful to Detective Superintendent Pat Campbell, Specialist Crime Division, Police Scotland, for assistance in understanding the VIPER process and to Professor Alan Page, for comments on earlier drafts of this chapter.

2 For consideration of issues which arise in relation to other forms of identification evidence see C Carracher, "Voice identification evidence" (1991) 16 Legal Service Bull 27; F Bates, “Identification from photographic evidence” (1977) 6 Anglo-Am LR 90; W de Villiers, “Fingerprint evidence has been under sustained attack in the United States of America for the last number of years: is the critique with regard to reliability sufficiently penetrating to warrant the exclusion of this valuable evidence?” (2012) 12 OUCLI 317; D Ormerod, “Sounds familiar? Voice identification evidence” [2001] Crim LR 595.

3 Mistaken eyewitness identification was the most common “cause” of wrongful conviction in the two leading studies of exonerations in the US: see ch 4.

4 In the US, identity parades are referred to as “lineups”, and stand-ins/foils are referred to as “fillers” or “distractors”.

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requirement having been treated as a sufficient safeguard in itself. At issue is whether alternative safeguards should be introduced following the abolition of the requirement for corroboration and, if so, the form these safeguards should take.

5.2 The Scottish approach

During the investigation of a serious crime, suspicion may focus on one or more individuals. At this point, the police will commonly organise a pre-trial identification procedure. This may be a ‘live’ parade, in which a suspect is placed in a lineup, and witnesses are asked, one at a time, to indicate whether they recognise anyone in the parade as the perpetrator. Rather than a live parade, police forces in the UK are now more likely to hold video parades, such as PROMAT (Profile Matching) and VIPER (Video Identification Parade Electronic Recording). VIPER is generally used in Scotland, while PROMAT tends to be used in England and Wales. Both systems use photographs taken from a central database rather than live participants. Amina Memon and her colleagues have described the VIPER process as follows:5

The basic descriptors of the suspect are entered into the database, the best matches to the description are displayed on a screen and the operator can then select foils on the basis of general resemblance to the suspect. In Scotland, lineups have between five and eight foils so the number of lineup members varies between six and nine. VIPER lineups are prepared in a standardized format comprising approximately 15-second clips of each person shown in sequence one after another. The sequence starts with a head and shoulders shot of the person looking directly at the camera, who slowly turns their head to present a full right profile followed by a full left profile. Finally the person returns to looking directly into the camera in a full-face pose. Each image is checked for quality control by the centralized National VIPER Bureau in Wakefield, West Yorkshire before a final recording is made.

Once the foils have been selected, the witness sits at a TV or laptop and each image is viewed in turn for 30 seconds. The witness can view the parade twice before being asked to make a decision, but in practice it seems that many witnesses make a remark on first viewing, either to the effect that they are certain that a particular photo is that of the perpetrator, or that the perpetrator is not present. Legislation provides that the prosecution can use as evidence a report of a pre-trial identification procedure. The report will name the accused as the person who was identified at that procedure, and there is then a presumption that the person so named is the accused.6

Dock identification is the process by which a witness who purports to be able to identify an accused person as the perpetrator is asked by the prosecution whether the person they have been talking about/describing is present in the courtroom. If the reply is a positive one, the witness is then asked to point to the perpetrator. There will often have been a time interval of several months between someone witnessing a crime and being asked to point out the perpetrator. It may well be, therefore,

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5 A Memon and others, “A field evaluation of the VIPER system: a new technique for eliciting eyewitness identification evidence” (2011) 17 Psychology, Crime and Law 711. This study concluded that “video parades and live parades are not producing any differences in the rate of suspect identifications” (at 723).
6 Criminal Procedure (Scotland) Act 1995 s 281A, inserted by the Vulnerable Witnesses (Scotland) Act 2004 s 4. The prosecution must serve on the accused the report, with a notice of intention to rely on it, at least 14 clear days before the trial. The accused has seven days in which to serve notice to the prosecution that s/he intends to challenge the contents of this report: s 281A(2) and (3).
that the witness can no longer say whether the accused is indeed the perpetrator, but if the witness does purport to be able to do so, this is regarded as strong evidence.

If the witness is unable to make a dock identification, then it is sufficient for the witness to testify to having made a positive identification on a prior occasion, and that the person identified on that earlier occasion was indeed the perpetrator. Police officers who were present at the pre-trial identification procedure can then testify that the person identified by the witness on that earlier occasion was the accused. The Scottish courts have held that the police can testify about the prior positive identification made by a witness, even if the witness now states that the accused is not the perpetrator. The police evidence as to what occurred at the parade is capable of corroborating a positive identification by another witness.

5.3 The problematic nature of eyewitness identification evidence

The potential for miscarriages of justice inherent in eyewitness identification evidence has been a focus of concern in many jurisdictions. More than 40 years ago, the English Criminal Law Revision Committee concluded that this type of evidence constituted the greatest cause of actual or potential wrongful convictions, and the advent of DNA analysis has shown this to be true: as chapter 4 noted, it was implicated in 76 per cent and 43 per cent of the wrongful convictions in Garrett’s and Gross and Shaffer’s research respectively. Its dangers have been recognised by the Scottish appeal court: “In a prosecution that rests on eye-witness identification the risk of a miscarriage of justice is notorious.” This stems from many factors, several of which are counter-intuitive, and each of which has been well-documented by empirical research:

- People are generally not adept at recognising someone with whom they are not well-acquainted. This shortcoming is exacerbated where the witness and the perpetrator are from different ethnic groups.

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10 Criminal Law Revision Committee, Evidence (n 9) para 196.
11 See ch 4.3.
• People can sometimes misidentify even those whom they know well – a phenomenon most of us have experienced in our own lives. There is also a tendency to persuade oneself that an unknown person (“A”) is in fact someone whom one already knows (“B”). In recalling the encounter at a later date, the memory of B becomes more and more like that of A.14

• It may be thought that people are likely to have a better recall of unusual events, such as witnessing a crime, than for other, more mundane events. In fact, stressful situations such as being the victim of a violent crime actually lead to a decrease in the likelihood of later accurate identification of the perpetrator.15

• It may be thought that an incident in which a weapon is involved would be recalled more accurately than one where there was no weapon. However, the presence of a weapon (for example, in an armed robbery) decreases the likelihood of an accurate identification of the perpetrator.16

• Eyewitnesses identify a “stand-in” or “filler” in approximately 20 per cent of police identification parades.17 As one author concludes: “This means that one in five eyewitnesses in real cases who are willing to give sworn testimony that would put a person behind bars for a long time... are undeniably wrong.”18

• The confidence with which an eyewitness expresses his or her identification at trial is “the most powerful single determinant of whether or not observers of that testimony will believe that the eyewitness made an accurate identification”.19 Yet there is in fact no correlation between confidence at trial (as distinct from during the pre-trial identification procedure) and the accuracy of the identification.20 This fact makes it very difficult for a judge or jury to assess the evidence; we tend to assume that a witness who is certain that the accused is the perpetrator is more likely to be right about this than a witness who is hesitant or less sure. There is a lack of scepticism on the part of jurors.21 They tend to give too much weight to confident assertions of positive eyewitness identification.22

16 Cutler and Penrod (n 13) 101-102. The authors referred to this as “weapon focus”. See also Thompson (n 15) at 1493; Rabner (n 13) at 1266-1267.
17 Thompson (n 15) at 1489.
18 Thompson (n 15) at 1489-1490.
21 Baxter (n 13) at 180, citing P Wall, Eye-Witness Identification in Criminal Cases (1965) 19.
5.4 Potential safeguards

As previously noted, many jurisdictions have introduced safeguards in recognition of these inherent dangers, and other potential safeguards have been advocated in the literature.

Cross-examination

The ability of the defence to cross-examine the prosecution witnesses is often regarded as one of the great strengths of the adversarial process. Scots law puts great store on the ability of cross examination to uncover “the truth”: this was listed in Gage v HM Advocate as one of several reasons for holding expert testimony on the dangers associated with eyewitness evidence to be inadmissible. Similarly, in Bruce v HM Advocate the appeal court noted:

This is a classic case where the evidence of eye witnesses must be weighed, assessed and decided upon by the jury. Matters of credibility and reliability are entirely for them. Weakness or flaws in the eye witness’s evidence were brought to the jury’s attention both in cross examination and in speeches. It was then for the jury to decide what evidence to accept, and what evidence to reject.

Cross-examination may be a useful process for determining whether a witness is lying or telling the truth. However, it is less successful as a forensic technique in determining whether a witness is mistaken about an eyewitness identification. As noted in R v Atfield:

...the danger of mistaken visual identification lies in the fact that the identification comes from witnesses who are honest and convinced, absolutely sure of their identification and getting surer with time, but nonetheless mistaken. Because they are honest and convinced, they are convincing.

A requirement for supporting evidence

As chapter 3 noted, Scots law currently requires corroboration of the identity of the accused as the perpetrator. It can, however, be argued that the approach the courts have taken to corroboration of

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23 According to Wigmore, cross-examination was “beyond doubt the greatest legal engine ever invented for the discovery of the truth” (J H Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law, 3rd edn (1940) para 1367).
24 [2011] HCJAC 40. This case is discussed further below.
25 At paras 21-22. Expert evidence is discussed further below.
27 Bruce at para 10 per Lady Paton, quoted in McNally at para 30.
28 According to the Devlin Report, in relation to testimony relating to honest but mistaken eyewitness identification, the “weapon of cross-examination is blunted”: Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases (HC338, 1976) para 1.24. See also J C Brigham and R K Bothwell, “The ability of prospective jurors to estimate the accuracy of eyewitness identifications” (1983) 7 Law and Human Behavior 19; G L Wells and R Lindsay, “How do people infer the accuracy of eyewitness memory?” in S M Lloyd-Bostock and B R Clifford (eds), Evaluating Witness Evidence (1983); Wise, Dauphinaise and Safer (n 20) at 828. The limits of cross-examination as a safeguard are also considered in Cutler and Penrod, Mistaken Identity (n 13) 143 onwards.
29 (1983) 25 Alta LR (2d) 97 at para 3 per Belzil JA. See also Roberts (n 13) at 106.
identification means that it is in practice a rather weak safeguard.\(^{30}\) As was stated in *Ralston v HM Advocate*,\(^{31}\) “where one starts with an emphatic positive identification by one witness then very little else is required”.\(^{32}\) Thus there need not be two witnesses who positively identify the accused as the perpetrator. If one witness does so, it suffices that another testifies that the accused has the same build,\(^{33}\) or resembles the perpetrator “by just basic looks”.\(^{34}\) In *Murphy v HM Advocate*,\(^{35}\) the resemblance was on the basis of the accused’s height and dark hair colour. As the commentary to this case put it:\(^{36}\)

...it remains the law that a positive identification and very little else will do. ‘Positive’ in this context means only that the witness was emphatic in her evidence, and the rule applies even where the accused was someone unknown to the witness who saw him for only a short time.

The dangers in this approach are apparent from the discussion above; a wealth of literature shows that confidence at the time of the trial is no indication of accuracy, since a witness can be “positive” but very much mistaken.

In Scotland, even the primary identification evidence need not be strong; a “positive” identification may be based on a witness who states that the accused is “very like” the perpetrator.\(^{37}\) A jury were entitled to convict in one case in which one witness testified to being 80 per cent certain, and another to being 75 per cent certain, that the accused was the perpetrator.\(^{38}\) This approach to identification evidence prompted Gerald Gordon to comment that:\(^{39}\)

the courts are determined to restrict as much as possible any effect the law of corroboration may have in making it more difficult to convict on the basis of identification evidence alone, despite the notorious unreliability of such evidence.

In England, the Devlin Committee stressed its:\(^{40}\)

...wish to ensure that in ordinary cases prosecutions are not brought on eye-witness evidence only and that, if brought, they will fail. We think that they ought to fail, since in our opinion it is only in exceptional cases that identification evidence is by itself sufficiently

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\(^{30}\) This is discussed further in F P Davidson and P R Ferguson, “The corroboration requirement in Scottish criminal trials: should it be retained for some forms of problematic evidence?” (2014) 18 E&P 1. See also ch 3.

\(^{31}\) 1987 SCCR 467.

\(^{32}\) At 472 per Lord Justice-General Emslie.

\(^{33}\) *Nelson v HM Advocate* 1988 SCCR 536.

\(^{34}\) *Adams v HM Advocate* 1999 JC 139.

\(^{35}\) 1995 SCCR 55.

\(^{36}\) At 62.

\(^{37}\) *Gracie v Allan* 1987 SCCR 364 at 366 per Lord Justice-Clerk Ross: “The appellant appeared to be under the impression that identification evidence was only sound if a witness was able to say that he or she was a hundred per cent sure that the accused was the person whom he or she had seen. That of course is not the case.”

\(^{38}\) *Nolan v McLeod* 1987 SCCR 558.

\(^{39}\) Commentary to *Kelly v HM Advocate* 1998 SCCR 660 at 667.

\(^{40}\) *Report of the Departmental Committee on Evidence of Identification* (n 28) para 8.4. The Committee was established following the *Dougherty and Virag* cases. The Devlin Report stated (at para 1.2) that “Honest but mistaken identification by prosecution witnesses was the prime cause of the miscarriages of justice” in both of these cases.
reliable to exclude a reasonable doubt about guilt. We recommend that the trial judge should be required by statute

a. to direct the jury that it is not safe to convict upon eye-witness evidence unless the circumstances of the identification are exceptional or the eye-witness evidence is supported by substantial evidence of another sort; and

b. to indicate to the jury the circumstances, if any, which they might regard as exceptional and the evidence, if any, which they might regard as supporting the identification; and

c. if he is unable to indicate either such circumstances or such evidence, to direct the jury to return a verdict of not guilty.

This recommendation was not implemented in legislation, but in 1977 the English courts did develop a judicial direction on eyewitness identification evidence in *R v Turnbull*\(^{41}\) (discussed below).

Corroboration of eyewitness identification is not generally required in the US, but it has been recommended for cases in which the accused was not well-known to the witness before the crime. It has been suggested that the introduction of a corroboration requirement would relieve the prosecution:\(^{42}\)

...of the moral dilemma of how to deal with an eyewitness-victim who can make an identification but where this is the only evidence in the case – a prosecutor can just say no to prosecuting until the police have fulfilled their responsibility to obtain other evidence.

Given that the current corroboration requirement is rather weak, however, this is unlikely to be an adequate safeguard and is not recommended here.

**Dock identification could be contingent on appropriate pre-trial identification**

The potential unfairness of allowing witnesses to make dock identifications has featured in many recent appeal cases in Scotland.\(^{43}\) The appeal court has recognised that it is:\(^{44}\)

...open to the criticism [that] the accused... can always be said to have helped the eyewitness to believe he was the same person whom the eyewitness originally observed in incriminating circumstances. Not only does a dock identification lack the safeguards that are offered by an identification parade but it positively increases the risk of wrong identification by suggesting to the witness that the person in the dock is the person who is said to have committed the crime.

In 1975 the Thomson Committee recommended that pre-trial identification parades should replace dock identification, and that the latter should no longer be permitted where the witness had failed to identify the accused at a parade.\(^{45}\) This was not implemented, and the appeal court has rejected

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\(^{41}\) [1977] QB 224.

\(^{42}\) Thompson (n 15) at 1495-1496.


\(^{44}\) *NC* at para 12 per Lord Brodie.

\(^{45}\) *Criminal Procedure in Scotland (Second Report)* (Cmnd 6218: 1975) paras 46.10 and 46.13. It seems that a working party chaired by Sheriff Principal Bryden also considered the question of dock identification, but "decided against proscribing dock identifications where these have not been preceded by an identification
the argument that where there had been no pre-trial identification it is unfair to allow a complainer to identify the person in the dock as the perpetrator - this was despite the fact that in the case in question, the court had been cleared of members of the public, leaving only one person who could be identified.\textsuperscript{46}

In \textit{Holland v HM Advocate}\textsuperscript{47} it was argued that dock identification infringed article 6 of the ECHR since it breached the privilege against self-incrimination by compelling the accused to assist the prosecution in making its case. This argument was described by Lord Rodger as “devoid of merit”,\textsuperscript{48} but he did state that “judges should give an appropriate and authoritative direction” concerning “the peculiar dangers of a dock identification where a witness previously failed to identify at an identification parade”.\textsuperscript{49} He also noted that the Crown accepted:\textsuperscript{50}

\begin{quote}
...that identification parades offer safeguards which are not available when the witness is asked to identify the accused in the dock at his trial. An identification parade is usually held much nearer the time of the offence when the witness’s recollection is fresher. Moreover, placing the accused among a number of stand-ins of generally similar appearance provides a check on the accuracy of the witness’s identification by reducing the risk that the witness is simply picking out someone who resembles the perpetrator. Similarly, the Advocate Depute did not gainsay the positive disadvantages of an identification carried out when the accused is sitting in the dock between security guards: the implication that the prosecution is asserting that he is the perpetrator is plain for all to see. When a witness is invited to identify the perpetrator in court, there must be a considerable risk that his evidence will be influenced by seeing the accused sitting in the dock in this way. So a dock identification can be criticised in two complementary respects: not only does it lack the safeguards that are offered by an identification parade, but the accused’s position in the dock positively increases the risk of a wrong identification.
\end{quote}

This may have led defence practitioners to believe that pre-trial identification procedures would become the norm, at least for solemn cases, but this has not transpired.\textsuperscript{51} In the recent case of \textit{Brodie v HM Advocate},\textsuperscript{52} the appeal court concluded that there had been a misdirection in the trial judge’s approach to dock identification evidence. According to Lord Justice-General Gill:\textsuperscript{53}

\begin{quote}
In my opinion, it would have been sufficient in this case if the trial judge had pointed out to the jury that the person whom [the witness] said that she saw in the car park was not someone whom she knew; that a period of over 15 months had elapsed between the date of
\end{quote}

\textsuperscript{46} \cite{Dudley v HM Advocate:1995 SCCR 52.}
\textsuperscript{47} \cite{[2005] UKPC D 1.}
\textsuperscript{48} At para 36.
\textsuperscript{49} At para 58.
\textsuperscript{50} At para 47.
\textsuperscript{51} C Shead, “Identification and the statutory right under s 290 of the Criminal Procedure (Scotland) Act 1995” \cite{2012 SCL 343.}
\textsuperscript{52} \cite{2013 JC 142. This was followed in Robson v HM Advocate [2014] HCJAC 53, and in Docherty v HM Advocate [2014] HCJAC 71. In the latter, it was argued that the Crown should not rely on identification by police photographs, especially where an identification parade has been held, but this argument was rejected by the appeal court.}
\textsuperscript{53} \textit{Brodie} at para 19. The Court held that the misdirection was not fatal to the conviction.
that sighting and her identification of the appellant in the dock; and that she had not taken part in a formal identification parade. The trial judge should have directed the jury that a dock identification lacked the safeguards inherent in an identification parade, where the presence of stand-ins of similar build and height can give some objective support to the reliability of an identification of the accused. The trial judge should then have directed the jury to bear in mind that when the appellant was identified by [the witness] he was sitting in the dock of the court between two custodial officers...

Finally, he should have directed the jury that it was entirely a matter for them to decide whether these considerations gave them any cause to doubt the reliability of the identification that [the witness] had made.

The Court, however, rejected the defence submission that the trial judge should have directed the jury “that the possibility of an inconclusive result to an identification parade, if one had been held, could have been deployed on the appellant’s behalf to cast doubt on the accuracy of any subsequent identification”.  

In Gage v HM Advocate, the appeal court noted that dock identification where there had not been a positive pre-trial identification by the witness did not automatically make a trial unfair. However, Lord Justice-General Hamilton added: “The law may be different in other jurisdictions – particularly those in which corroboration of eyewitness identification evidence is not essential.” This suggests that our assessment of what constitutes a fair trial may well be different once the corroboration requirement is abolished in Scotland, and the law may require to be changed.

The Scottish approach is in contrast to that taken in other jurisdictions where dock identification is regarded as being “of little probative value” when made by a witness who has no prior knowledge of the accused. This recognises that the court lay-out and trial circumstances “conspire to compel the witness to identify the accused in the dock”. Thus dock identification is not permitted in Australia or Ireland unless the witness has identified the accused as the perpetrator pre-trial. In Australia, the police must hold an identity parade, unless the accused refuses to participate or it is not otherwise reasonable to hold one.

The Devlin Report made a similar recommendation for English law to that of the Thomson Committee – that is, pre-trial identification “should be made a condition precedent to identification in court”. As with Thomson, this was not implemented. However, while dock identifications are not technically inadmissible in England, they are regarded as undesirable. In practice, where a witness has failed to pick out the accused at a pre-trial identification procedure, a trial judge would be likely

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54 Brodie at para 20. This was based on the approach taken by the Privy Council in Tido v R [2011] UKPC 16.
56 Citing Holland v HM Advocate [2005] UKPC D 1 at para 9 per Lord Hope of Craighead and paras 41-42 per Lord Rodger of Earlsferry.
59 Ibid.
60 See ch 16 of this report.
61 For example, where a witness is not well enough to take part.
to advise the jury that a dock identification could not be safely relied upon. In *R v Forbes*, the House of Lords relied on section 78 of the Police and Criminal Evidence Act 1984 (PACE) to exclude identification evidence where, contrary to Code D, an identification parade should have been held, but was not.

As such, it is suggested that a sensible way forward for Scotland would be for legislation to specify that dock identification evidence is generally inadmissible unless there has been a positive identification of the accused as the perpetrator during a properly conducted pre-trial identification procedure. An exception to this should be made, however, where the accused refused to co-operate in the holding of a pre-trial identification procedure, or it was not otherwise reasonable for such a procedure to be held.

**Rigorous pre-trial identification procedures**

Whether or not the above recommendations are followed, the procedures used in pre-trial identification are crucial. In England, PACE Code D is designed to “provide safeguards against mistaken identification”. The Code provides detailed requirements covering video identification, street identification, intimate sampling, and identification of suspects from fingerprints and footprints. A breach of Code D by the police can be rectified if the trial judge gives appropriate directions to the jury, but failure to do so may lead to a conviction being quashed on appeal – even where the case against the appellant was a strong one.

The safeguards contained in Code D include the following:

(a) A record has to be made of the description of the suspect which is initially given by a potential witness. This must generally be done before the witness takes part in any other identification procedures, and a copy must be given to the suspect or the suspect’s solicitor.

(b) Defence lawyers are permitted to attend pre-trial identity procedures.

(c) There must be at least eight stand-ins/foils in a pre-trial identification procedure.

(d) The suspect can select where to stand in the line-up.

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63 [2001] 1 All ER 686.

64 Code D is discussed further below.

65 “The manner in which an identification parade is compiled and executed is critical to ensure that miscarriages of justice based on faulty eyewitness evidence are kept to a minimum.” (Memon and others (n 5) at 726).


68 Code D para 3.1. See also Annex B, para 3.

69 Suspects “must be given a reasonable opportunity to have a solicitor or friend present” during an identity parade (Code D para 1). Note, however, that it has been suggested that safeguards such as presence of a lawyer “may not be as effective as the legal system intended them to be”: see J L Devenport and others, “Eyewitness identification evidence: evaluating common-sense evaluations” (1997) 3 Psychology, Public Policy and Law 338 at 361.

70 Code D Annex B para 9 (parade); Annex A para 2 (video).
(e) Any reasonable objections the suspect or his/her solicitor has to the composition of the parade should be accommodated.\(^{72}\)

(f) Identification procedures should generally be video recorded so that the court can assess their fairness. If this is impractical, a colour photograph should be taken of the parade.\(^{73}\)

(g) The police should be required to advise the witness that the perpetrator may not be present in the lineup.\(^{74}\) One study compared the rate of “identifications” using mock lineups where the perpetrator was not in fact present. 78 per cent of witnesses made a “positive” (but of course incorrect) identification, where no warning was given. This dropped to 33 per cent when the witness was reminded that the suspect might not be present.\(^{75}\)

Other safeguards that have been suggested in the literature include:

(h) The police officer who is conducting the parade should be unconnected to the case, and should not know which of those in the line-up is the suspect.\(^{76}\) (This is known as “double-blind testing”).

(i) Stand-ins/foils should be similar to the verbal description given by the witness to the police, rather than looking similar to the suspect.\(^{77}\)

(j) Identifications should be done sequentially: rather than a witness viewing the entire parade from the outset, the witness is asked to look at one person in the line-up, and only if this person is rejected as a possible perpetrator is the next member of the lineup shown to the witness. It is important that this recommendation be combined with double-blind testing.\(^{78}\)

(k) Unlike certainty at the time of the trial, confidence in identifications which are made during pre-trial procedures is positively correlated with accuracy. Witnesses should be asked immediately

\(^{71}\) Code D para 13.
\(^{72}\) Code D para 12.
\(^{73}\) Code D para 23. In 1998 the Executive Committee of the American Psychology/Law Society Sub-Committee drafted good practice guidelines for constructing and conducting lineups and photospreads. They considered recommending that parades be video-recorded but rejected this inter alia due to cost: see Wells and others (n 19) at 641. This is more affordable today.
\(^{74}\) Code D para 16. This recommendation is frequently made in the literature: see L Gould, B von Hatten and J W Stickels, “Reforming the use of eyewitness testimony” (2010) 35 Oklahoma City University LR 131; Wells and others (n 19) at 629; Rabner (n 13) at 1265.
\(^{75}\) Wells and others (n 19) at 615, citing R S Malpass and P G Devine, “Eyewitness identification: lineup instructions and the absence of the offender” (1981) 66 Journal of Applied Psychology 482.
\(^{76}\) Wells and others (n 19) at 627-629. This safeguard is also recommended by Rabner (n 13) at 1265, and in both A D Rikard, “Why and how New York should enact mandatory statewide eyewitness identification procedures” (2010-11) 74 Albany LR 1525 at 1540 and D M Risinger, “Inquiry, relevance, rules of exclusion, and evidentiary reform” (2010) 75 Brooklyn LR 1349 at 1365.
\(^{77}\) For further details see Wells and others (n 19) at 630-635; Gould, von Hatten and Stickels (n 74) at 144-145.
\(^{78}\) For further details see Wells and others (n 19). Although the authors believe that this would be beneficial, they did not incorporate it into their recommendations on the basis that “the adoption of sequential lineups without the adoption of double-blind testing... might be worse than using simultaneous lineups without double-blind testing” (at 640).
following the identity procedure about their level of confidence in their identification, since this level can become inflated as a result of future events. For example, learning that other witnesses have identified the same person, the police have other evidence suggesting that the suspect is the perpetrator, or the suspect has previous convictions, can each increase a witness’s confidence that they have identified the “right” person, but are not related to the witness’s memory of the incident.79

(l) Serious breaches of statutory requirements for holding pre-trial identification procedures should result in the exclusion of the evidence. 80

(m) Cognitive interviewing techniques should be employed by the police when interviewing eyewitnesses. This involves the interviewer asking witnesses about what else they were doing on the day of the crime, and how they were feeling that day. They are asked to recall what they heard, as well as saw, and their emotions at the time. They are asked to recount the incident from the perspective of other witnesses, or even from the perspective of the perpetrator(s), and also to do so in a different order, working backwards from the end of the incident to its beginning. Witnesses are asked to include all details, even if trivial, since this may act as a trigger for more vital information. This is said to enhance their ability to recollect the details of a crime. Empirical studies have shown that these techniques significantly increase the amount of information provided by the witness.81

In Scotland, the procedures relating to pre-trial witness identification are not statutory. However, in 2007 the Lord Advocate issued Guidelines on the Conduct of Visual Identification Procedures. 82 These specify that:83

> Every precaution should be taken to ensure visual identification procedures are conducted in a manner that excludes any suspicion of unfairness or risk of erroneous identification.

How well do the Guidelines correspond to the safeguards described above? According to the Guidelines, it is “highly desirable that the suspect or accused person is legally represented at each stage of any formal identification parade”84 (corresponding to safeguard (b), above), and in practice the suspect’s solicitor is usually present. The Guidelines state that the officer conducting the parade and any other officers assisting him/her “must be entirely unconnected with the relevant inquiry/case”85 – this meets the first requirement of safeguard (h). The suspect can chose his own position in the lineup – safeguard (d) – and the suspect and his lawyer are to be advised that they have a right to object to the composition of the video identification parade or to any of the

79 Wells and others (n 19) at 635-636.
80 See further, below. For detailed recommendations for composing and conducting identification parades, see Rikard (n 76) at 1549-1550, and also R C Park, “Eyewitness identification: expert witnesses are not the only solution” (2003) 2 Law, Probability and Risk 305 at 308.
83 At 1.
84 At 2.
85 At 9.
arrangements made. Any reasonable request made by them should be accepted – safeguard (e). They should be permitted to see the complete set of VIPER images before it is shown to any witnesses, and any objections to the set or images noted. However, a parade may proceed despite the suspect’s solicitor having reservations or objections to some of the foils, unless the suspect refuses to participate.

In *Gage v HM Advocate*, the police had intended to hold an identification parade, there being five potential eyewitnesses, and the appellant was legally represented. Both the appellant and his solicitor objected to the composition of the parade, as the appellant was aged 31 and the stand-ins were all aged between 18 and 20. The police officer conducting the parade accepted that there was a large age difference but concluded that as masks were to be used to cover part of their faces and they were of the same general height/build as the accused, he did not consider there to be unfairness. The accused was adamant that he would not participate in a parade under the arrangements as they stood. The parade was then abandoned. This is an unsatisfactory situation, which leaves the suspect open to later, dubious dock identification.

The *Guidelines* provide that there should be at least five “stand-ins”, but note that “justice may more clearly be seen to be done by including 6, 7 or 8 other images”. The minimum number in any video identification parade is six, including the suspect, but if there are many suitable images there can be up to eight foils. These should, so far as possible, resemble the suspect “in terms of age, build, dress and general appearance”. This means that there can be as few as six participants/images in a Scottish parade, compared to the minimum of nine which is required in England (see safeguard (c)). In practice, however, it seems that the National VIPER Bureau generally compiles 12 foils and the police use between seven and 12 of those. However, in relation to both VIPER and live parades, the officer conducting the procedure knows which of the participants/images is the suspect.

Immediately before the images are viewed, the *Guidelines* provide that the police should read out a statement to the witness, worded to suit the witness’s age and capacity. The example provided for use for an adult witness is that “the person you referred in your statement to the police, who [date, place and description of alleged offence as provided by the witness] … may or may not appear in the images shown”. This corresponds to safeguard (g).

It should be noted that the *Guidelines* state:

> It is more important that the other persons [in the parade] resemble the suspect or accused than that they should be like any descriptions previously given by witness(es).

This is contrary to what much of the literature advises: safeguard (i) provides that stand-ins/fillers should resemble the verbal description given by the witness, rather than looking similar to the suspect.

The *Guidelines* provide that the officer-in-charge of the case may be present during the identification procedure, but must “take no active part”. This is not appropriate – see safeguard (h). A detailed
written record is kept, but there is no requirement that the procedure be video recorded (safeguard (f)). Since these Guidelines do not have the force of law, their breach seems to have little impact on the admissibility of the evidence resulting from an identification.

In conclusion, a number of suggestions can be made. First, legislation (or a code of practice required by legislation) should specify requirements governing the conducting of pre-trial identification and/or police interviewing procedures. These requirements should include the following:

- There should be a minimum of eight stand-ins or images other than that of the suspect in an identification procedure.
- The officer conducting the procedure should not know which of the participants/images is the suspect. The officer in charge of the case should not be present.
- Stand-ins/fillers should resemble the verbal description given by the witness, rather than looking similar to the suspect.
- Identifications should be done sequentially, with one person or image being shown to the witness at a time.
- Witnesses should be asked immediately following the identity procedure about their level of confidence.
- The entire procedure should be video recorded.

Secondly, serious breaches of these requirements should result in the exclusion of the evidence. Thirdly, the police should employ cognitive interviewing techniques to enhance witness recall.

**Mandatory judicial directions where the prosecution case rests on contested eyewitness identification evidence**

In Scotland, the nature and extent of any directions given to the jury about eyewitness identification evidence are largely at the discretion of the trial judge. Lord Justice-General Emslie issued a practice note in 1977 in which he suggested that in cases where the Crown case is based on a “fleeting glance” identification or similarly problematic identification, trial judges should “continue to follow the sound practice” of reminding the jury to approach the assessment of the evidence with particular care.

More recently, in the case of *Farmer v HM Advocate*, the trial judge, Lord Cullen, advised the jury that:

> it is necessary to adopt a considerable amount of care in approaching evidence of identification. It is well known that errors in identification can arise. There have been cases of mistaken identity, so any case in which a jury is asked to find guilt based on the opportunity that was provided for witnesses to see an assailant whom they later identify has to be approached with a considerable amount of care.

> There are a number of considerations which I think you should bear in mind. The first is the means that the witness in question had for observing the attacker; what means did the witness have? If it’s not a person previously known to the witness and recognised by that

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92 See *McAvoy v HM Advocate* 1991 JC 16 at 26; *Blair v HM Advocate* 1994 SLT 256 at 259.

93 See the Commentary to *McAvoy v HM Advocate* 1991 SCCR 123 at 131. It seems that this is printed as Appendix H to the Bryden Report (n 45).

94 1991 SCCR 986.

95 At 987.
witness as such, then the witness may have a very, relatively, short time to be able to compile any memory as to what he or she was saying. How long did the witness have the opportunity to see the attacker? Then again, another important consideration would be the extent to which the assailant’s face and figure were capable of being observed through the effect of clothing or any other obstruction or what happened in the incident itself.

Then again, when the witness has later identified somebody, on some occasion like the identification parade, how positive was that identification? What reasons did the witness give for picking out the person on that occasion, and then again you may require to consider what opportunity there was for there to be a confusion as regards the person picked out with somebody whom the witness had seen on some other occasion than the occasion of the crime in question.

So you will see that there are a number of important matters that require to be weighed up and the task is not an easy one and, in this particular case, I have to say to you, ladies and gentlemen, that you may have considerable difficulty in weighing up. The task of assessment is not an easy one, it is certainly one which has to be approached with great care and circumspection.

This mirrors some of the points stressed in the English Turnbull case, described below. Such detailed directions are not always given; if a trial judge fails to give any direction regarding identification evidence in a case where identification is at issue, this may amount to a misdirection, but will not always be fatal to the conviction. Of course, juries may not always understand and abide by such directions, and the prohibition on juror research in the UK makes it difficult to know whether one ought to have confidence in the abilities of juries in this regard. It should also be noted that the Scottish Jury Manual gives a specimen direction for trial judges to give juries when assessing eyewitness identification evidence that asks them to consider: “How positive have the identifications been, both in court and at the identification parade?” A “highly positive” identification presumably means one in which the witness expresses confidence in the accuracy of his or her identification. As previously noted, while there is a correlation between confidence and accuracy in respect of some forms of pre-trial identification, there is no correlation between confidence and accuracy of dock identifications, yet the specimen direction fails to make this clear.

Reference has already been made to the case of Gage. In a later appeal in the same case, Lord Justice-General Hamilton quoted from the case of Reid and Others v The Queen, a Privy Council appeal from Jamaica:

If convictions are to be allowed upon uncorroborated identification evidence there must be strict insistence upon a judge giving a clear warning of the danger of a mistaken identification which the jury must consider before arriving at their verdict.

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96 See Webb v HM Advocate 1996 JC 166 (a case in which the witnesses had been drunk when the crime was committed).
97 Research into juries’ deliberations is prohibited by s 8 of the Contempt of Court Act 1981. Ch 9 explores the issue of the comprehension of jury directions in greater depth and concludes that there may be grounds for cautious optimism about their effectiveness.
100 [1990] 1 AC 363.
101 Gage at para 33 (quoting from Reid at 381).
The proposed abolition of a corroboration requirement in Scottish law suggests a similar approach. Since the Court of Appeal decision in *Turnbull*, trial judges in England must advise juries of the dangers inherent in some form of eyewitness identifications, and the special need for caution in assessing such evidence. The jury must be told to examine closely the circumstances in which the identification came to be made. *Turnbull* provided a list of questions for the jury to consider:

- How long did the witness have the accused under observation?
- At what distance?
- In what light?
- Was the observation impeded in any way, as for example by passing traffic or a press of people?
- Had the witness ever seen the accused before?
- How often?
- If only occasionally, had he any special reason for remembering the accused?
- How long elapsed between the original observation and the subsequent identification to the police?
- Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?
- If in any case... the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them.

The trial judge should remind the jury of any specific weaknesses in the identification evidence. Even where the eyewitness was acquainted with the suspect prior to the incident, the judge must remind the jury that mistaken identifications involving close friends and relatives can occur. Failure by the trial judge to give a *Turnbull* direction “will nearly always by itself be enough to invalidate a conviction which is substantially based on identification evidence”. The US Supreme Court heard the case of *Manson v Braithwaite* in the same year as *Turnbull*, and reached similar conclusions: the jury should consider the witness’s opportunity to view the perpetrator during the crime, and the time lag between the original observation and the subsequent identification. It should also consider the degree of certainty expressed by the witness at the pre-trial identification, the accuracy of the verbal description of the perpetrator initially given by the witness, and the degree of attention of the eyewitness during the crime. It has since been argued, however, that many of the assumptions made by the court in stressing the importance of these

103 At 228 per Lord Widgery CJ.
104 *Turnbull* at 228 per Lord Widgery CJ. No particular form of words needs to be used in giving this direction, but “the trial judge must ensure that the full force of the *Turnbull* direction is conveyed to the jury in whatever words are chosen”: *R v Nash* [2004] EWCA Crim 2696 at para 8 per Hedley J.
105 *Turnbull* at 228.
factors were not correct. Thus although it is true that the greater and better the opportunity to view the perpetrator during the crime, the more accurate subsequent identification is likely to be, it is also the case that subsequent events, such as being informed by the police that a “correct” identification has been made, can distort the witness’s assessment of how good the opportunity to see the perpetrator was. Furthermore, it seems that the accuracy of an eyewitness in describing the perpetrator is not in fact related to accuracy in identifying the perpetrator.

In Ireland a trial judge must direct the jury to be “specially cautious” in assessing certain forms of identification evidence, and should list the factors which can affect the reliability of such evidence. In Australia, trial judges are likewise required to stress the special need for caution where assessing eyewitness identification evidence, and of the reasons for caution, both generally and in the circumstances of the case. The Australian Law Reform Commission considered whether to amend the relevant statute to specify that this was only required where the reliability of the identification evidence was in dispute. It concluded that this was not necessary – largely because other, similar sections of the legislation would also require to be amended. It is submitted that Scotland ought to include this factor; it would confuse juries were a direction to be given cases in which the identification evidence was uncontested.

Canadian juries may convict on the basis of uncorroborated eyewitness evidence, but again, trial judges must direct the jury of the dangers of such evidence when identification is contested. An inquiry into a case involving a wrongful conviction recommended that judges be required to tell juries that “mistaken eyewitnesses identification has been a significant factor in wrongful convictions of accused in the United State and Canada”. Canadian juries must be told about the weak link between confidence exhibited by an eyewitness in testimony and the accuracy of that identification.

In the US, the Supreme Court of New Jersey has held that where the accused alleges that pre-trial identification was influenced by extraneous factors, the prosecution should bear the burden at a pre-trial hearing of establishing the reliability of that identification evidence. Where there have been shortcomings in the pre-trial identification procedure, the trial judge must give appropriately tailored directions to the jury.

On the basis of the preceding discussion, a number of suggestions can be made. First, it is suggested that legislation should specify that trial judges must direct juries of the dangers of convicting in cases involving uncorroborated identification evidence, where identification of the accused as the

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108 Wise, Dauphinaise and Safer (n 20) at 815.
109 At 816.
110 At 817.
111 This is referred to as a Casey warning: People (AG) v Casey No2 [1963] IR 33.
112 Uniform Evidence Act, s 116. It is not necessary that a particular form of words be used. See also Evidence Act 1995 (Commonwealth) s 165. The judge need not issue a direction if there are “good reasons for not doing so”: s 165(3).
113 See ch 9, which considers this issue in greater depth.
114 R v Mezzo [1986] 1 SCR 802, cited by Dufraimont (n 9) at 268.
115 Cited in Baxter (n 13) at 175.
117 State v Henderson 27 A 3d 872 (NJ 2011). For a discussion of the case by the Chief Justice wrote the judgment, see Rabner (n 13). The approach taken by the court is commended as a model in R Couch, “A model for fixing identification evidence after Perry v New Hampshire” (2013) 111 Michigan LR 1535 at 1537.
perpetrator is an issue at the trial. A form of wording should be specified in the bench book, to minimise appeals, but discretion is needed to allow for the circumstances of the case. The trial judge should stress the specific dangers associated with eyewitness identification, and its association with wrongful convictions. The charge in Farmer should be taken as a starting point of factors to be considered, but jurors should also be told that mistakes are common – more so where the witness and perpetrator did not know each other prior to the incident in question, but can occur even where they were previously well acquainted. They should be informed that confidence in asserting a ‘positive’ identification at the time of the trial is not necessarily associated with accuracy. Where guidelines on the conduct of pre-trial identification procedures have been breached in a way which calls into question the accuracy or fairness of the subsequent positive identification, there should be a pre-trial hearing at which the prosecution have to establish that it would nevertheless be safe to admit evidence of the identification.

**Judicial discretion to hold that weak eyewitness identification is inadmissible**

The US Federal Rules of Evidence provide in Rule 403 that evidence may be excluded “if its probative value is substantially outweighed by a danger of ... unfair prejudice, confusing the issues, [or] misleading the jury”. It has been suggested that judges should make use of this in declaring suspect pre-trial identification to be inadmissible. In the most recent case on identification evidence from the US Supreme Court, Perry v New Hampshire the Court referred to Rule 403 as one of the safeguards of its adversarial system which is designed to “caution juries against placing undue weight on eyewitness testimony of questionable unreliability”. The Devlin Report recommended for English law that where a trial judge considers that there has been a breach of police procedures relating to an identity parade which renders the identification unsatisfactory, the parade “should by statute be treated as a nullity and any evidence that emerges out of it should be excluded”. A more general provision has been enacted: s 78(1) of PACE provides:

> In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

This provision has been applied to quash a conviction where there has been a breach of code D.

Two possible ways forward are suggested here. The first option is that, given that there are other forms of evidence which are associated with miscarriages of justice, for example, confession

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118 This is recommended by Baxter (n 13) at 176-177.
119 E G Shell, “A recipe for mistaken convictions: why federal rules of evidence should be used to exclude unreliable eye-witness identification evidence” (2013) 46 Suffolk University LR 263.
120 At 728-729.

Evidence, legislation is enacted in Scotland to provide for the exclusion of evidence, similar to the US Federal Rules of Evidence and section 78 of PACE (i.e. a general provision). The second option is that a more specific provision could be enacted relating to identification evidence. Such legislation could specify that where identification is contested at trial, there is no corroboration of an eyewitness's identification, and the circumstances surrounding the pre-trial identification are such that its probative value is substantially outweighed by the danger of unfair prejudice to the accused, the trial judge must hold the evidence to be inadmissible.

Judicial discretion to withdraw the case from the jury/direct an acquittal

In Scotland, a trial judge may rule at the close of the Crown case that there is no case for the accused to answer, and acquit the accused. At present, the test is whether there is sufficient evidence for conviction (essentially whether or not there is corroborated evidence of every crucial fact). The judge may not usurp the jury's decision purely on the basis that the quality of one or more pieces of evidence is too weak to sustain a conviction. This is illustrated by Strachan v HM Advocate: counsel for the accused had submitted that the trial judge ought to withdraw the case from consideration by the jury, on the basis that no reasonable jury could convict on the basis of the weak identification evidence. The appeal court commented that:

Such a submission, as distinct from one based on sufficiency of evidence, was not one which the trial judge could have sustained. But, in any event, it was repelled on its merits and the trial judge proceeded to give the jury the customary directions on the need to take particular care in the assessment of identification evidence.

That trial judges ought to have discretion to direct a jury to acquit in cases in which the identification evidence is problematic, and there is no supporting evidence, was advocated in England by the Devlin Committee. This was followed in Turnbull, where the court advised that:

When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions ... [the trial] judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification.

It is suggested that Scots law follow suit and that the trial judge should have the power to withdraw the case from the jury on the basis that the strength of the eyewitness identification evidence is such that a properly directed jury could not reasonably convict the accused.

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124 This is considered in ch 6 of this Report.
125 Criminal Procedure (Scotland) Act 1995 s 97.
126 See ch 12, where the no case to answer submission is considered in detail.
127 Williamson v Wither 1981 SCCR 214 (and see further ch 12).
129 At para 6.
131 [1977] QB 224 at 229-230 per Lord Widgery CJ.
**Expert testimony on the dangers associated with certain forms of identification evidence**

It may be argued that the charge to the jury comes at too late a stage to have a meaningful impact on a jury’s ability to assess eyewitness identification evidence.\(^{132}\) One alternative (or additional) approach is for expert witnesses to educate jurors on the dangers of misidentification. In *Gage v HM Advocate*,\(^{133}\) the defence sought to introduce evidence from a psychologist which would include, *inter alia*, that stressful events such as witnessing a crime (in this case, a murder) tends to decrease identification accuracy; and that information acquired by a witness after an incident can distort the witness’s memory of that incident. The appeal court listed several objections to such evidence: the credibility and reliability of a witness’s evidence is a question for the jury;\(^{134}\) the “invariable practice” is that the trial judge gives the jury “a specific and thorough direction that warns them that in certain circumstances such evidence may be unreliable” and refers “to specific considerations that might be thought to affect the reliability of an identification made by an eye-witness”;\(^{135}\) the defence’s ability to “highlight potential unreliability of eyewitness identification in cross examination and lead evidence of objective physical factors that might affect the reliability of the identification”.\(^{136}\) Allowing expert testimony would “create a climate of disbelief”.\(^{137}\) The “basic approach of our law” was said to be “that a juror’s judgment on the reliability of an identification is a matter of life experience”.\(^{138}\) This fails to recognise that lay people have been shown to be generally ignorant of many of the dangers associated with some forms of identification evidence, as described above, and that some of the findings of the scientific research are counter-intuitive (for example the absence of any relationship between eyewitness confidence at trial and accuracy).

Expert testimony on the perils of eyewitness identification evidence has been advocated by many authors in the US\(^{139}\) and, in *United States v Smith*,\(^{140}\) it was held that the value of expert evidence far outweighed any prejudice or confusion it might cause. An expert witness was permitted “to educate the jury about the psychological literature regarding: cross-racial identifications; how stress impacts identifications; post-event information; and the weak correlation between a witness’s confidence and his or her accuracy”.\(^{141}\)

In Australia, the Law Reform Commission was critical of the common law rule that expert evidence was not required for issues which are matters of “common knowledge”.\(^{142}\)

> ... one of the consequences of the common knowledge rule has been to deny courts testimony on the working of memory, on the process of identification ... . To refuse to

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\(^{133}\) [2011] HCJAC 40.

\(^{134}\) At para 28 per Lord Justice-Clerk Gill.

\(^{135}\) At para 29.

\(^{136}\) At para 30.

\(^{137}\) At para 32.

\(^{138}\) At para 30.

\(^{139}\) See J Copeland, “Helping jurors recognize the frailties of eyewitness identification evidence” (2002) 46 Crim LQ 188; Stein (n 132); Wise, Dauphinaise and Safer (n 20); Dufrainmont (n 9) at 321 and 324-352; Rikard (n 76) at 1542; Cutler and Penrod (n 13) 250.

\(^{140}\) 621 F Supp. 2d 1207 (2009). See M Stoneman, “United States v Smith: An example to other courts for how they should approach eyewitness experts” (2011) 60 Cath University LR 533.

\(^{141}\) *United States v Smith* at 1218.

receive such evidence has the result that decisions can be based on knowledge that is incomplete and out-of-date.

It seems that the admissibility of expert evidence on the dangers associated with some forms of eyewitness identification is ‘a matter of conjecture’ in English law. Those who oppose the use of such evidence may fear that it would lead to jurors becoming sceptical of all eyewitness identifications. The Scottish courts have expressed such concerns, although the findings of empirical studies are mixed and it is difficult to reach a firm conclusion on whether this danger is likely to materialise. On the other hand, it could be argued that expert evidence offers little over and above a jury direction. As the findings of psychologists are fairly easy to explain and well-established a trial judge ought to be able to do this at a fraction of the cost of an expert and there is evidence from the relevant scientific studies to support that view.

In conclusion, there are differing views as to the merits of permitting expert testimony. Given that the case for its admissibility has not been made out and there is evidence to suggest that jury directions may be equally effective, it is suggested here that expert testimony on the dangers of certain forms of identification evidence, and the circumstances which make it more or less likely that a pre-trial identification is accurate, should not be permitted, but this will need to be considered carefully by the Review Group.

Judicial training

Most of the above recommendations relate to jury trials. The vast majority of Scottish trials are taken under summary procedure, where there is no jury. In such cases, it is vital that trial judges are well informed of the dangers inherent in eyewitness identification evidence, and of the circumstances which impact on the accuracy of pre-trial identification. This could be given as part of the general judicial studies training programmes for sheriffs. As such it is suggested that judicial training should be given on eyewitness identification evidence.

5.5 Issues for consideration

It is suggested that the Review should consider whether, in cases in which identification of the accused as the perpetrator is in dispute:

(a) legislation should specify that dock identification evidence is generally inadmissible unless there has been a positive identification of the accused as the perpetrator during a properly conducted pre-trial identification procedure.

(b) an exception to the rule in (a) should be made where the accused refused to co-operate in the holding of a pre-trial identification procedure, or it was not otherwise reasonable for such procedure to be held.

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145 See ch 9, where the relevant studies are considered in detail.
146 See ch 9, where the effectiveness of jury directions compared to expert evidence is considered in detail.
(c) legislation (or a code of practice required by legislation) should specify requirements governing the conduct of pre-trial identification procedures, and the circumstances in which an identification procedure should take place.

(d) the requirements specified in such legislation should include the following:
- There should be a minimum of eight stand-ins or images other than that of the suspect, in an identification procedure;
- The officer conducting the procedure should not know which of the participants/images is the suspect;
- The officer in charge of the case should not be present during the procedure;
- Stand-ins/fillers should generally resemble the verbal description given by the witness, rather than look similar to the suspect;
- Video identifications should be done sequentially, with one person or image being shown to the witness at a time;
- Witnesses should be asked immediately following the viewing of each image whether the image is, or resembles, that of the perpetrator; and about their level of confidence;
- The entire procedure should be video recorded.

(e) material breaches of the statutory requirements for holding pre-trial identification procedures should result in the exclusion of the evidence. This could be achieved through a provision similar to section 78(1) of the Police and Criminal Evidence Act 1984; such a provision would be of general application and would serve to implement suggestions made in other chapters of this report regarding the exclusion of evidence on the grounds of fairness.147

(f) the police should employ cognitive interviewing techniques to enhance witness recall.

(g) in solemn cases in which identification of the accused as the perpetrator is an issue at the trial, legislation should specify that trial judges must direct juries of the dangers of convicting in cases involving uncorroborated identification evidence.

(h) the form of wording for such a direction should be specified in the Jury Manual, to minimise appeals, but with discretion to allow for the circumstances of the case.

147 Section 78(1) of the 1984 Act provides as follows: “In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.” It will be noted that this wording refers only to preventing evidence being given. Where, however, the unfairness only becomes clear after the evidence has been led, the judge retains the option to direct the jury to disregard the evidence in question or to, if necessary, discharge the jury: R v Sat-Bhambra (1989) 88 Cr App R 55. This is because section 82(3) of the Act preserves the common law power of the judge to exclude evidence. Were an approach similar to section 78(1) to be adopted in Scotland – and the reference to section 78(1) here should not be taken as a suggestion specifically that the particular wording found in that provision should be utilised – it would be preferable for it to be drafted more broadly so as to avoid the difficulties to which its wording gave rise in Sat-Bhambra. On the history and general application of section 78(1), see K Grevling, “Fairness and the exclusion of evidence under section 78(1) of the Police and Criminal Evidence Act” (1997) 113 LQR 667; I H Dennis, The Law of Evidence, 5th edn (2013) ch 3.
(i) the trial judge should stress the specific dangers associated with eyewitness identification, and its association with wrongful convictions. The charge in Farmer should be taken as a starting point of factors to be considered, but jurors should also be told that mistakes are common – more so where the witness and perpetrator did not know each other prior to the incident in question, but can occur even where they were previously well acquainted. They should be informed that confidence in asserting a “positive” identification at the time of the trial is not necessarily associated with accuracy.

(j) legislation should specify that in cases where identification of the accused as the perpetrator is contested, the trial judge should have the power, in solemn procedure, to uphold a submission of no case to answer and withdraw the case from the jury on the basis that the quality of the eyewitness identification is such that a properly directed jury could not reasonably convict the accused, and, in summary procedure, to uphold such a submission on the basis that he or she could not find the offence proved beyond reasonable doubt.\textsuperscript{148}

(k) judicial training should be given on eyewitness identification evidence.

\textsuperscript{148} This is consistent with the more general proposals made regarding the no case to answer submission in chapter 12.
CHAPTER 6: CONFESSION EVIDENCE

Findlay Stark

6.1 Introduction

This chapter considers confession evidence, understood broadly to include out-of-court statements made by the accused that are adverse to his interests. Such evidence is intuitively damning because, as statements against interest, confessions are thought more likely to be true than false. This thought might lead confession evidence to have a “devastating” effect on the accused’s chances of acquittal, and “dominate” the consideration of other forms of evidence. Indeed, the French refer to a confession as la reine des preuves – the Queen of proofs. The social science literature on the causes and prevalence of false confessions in other jurisdictions (discussed briefly below) nevertheless demonstrates a need for caution in this area.

This chapter proceeds as follows. In section 6.2, the current Scottish rules on the admission of confession evidence (and the evidence gleaned from it) will be outlined. Section 6.3 then discusses what the existing Scots rules would look like if the corroboration requirement were removed without replacement, and contends that they would continue to deal with “unfair” confessions, such as those obtained through oppression, inducement, etc. Section 6.4 considers the social science literature that suggests that such a system would nevertheless likely risk wrongful convictions, because it would fail to address false confessions not obtained via “unfair” means. The remaining sections then consider various safeguards against wrongful convictions premised on false confession evidence. These are judicial directions (section 6.5), expert evidence (section 6.6), and a requirement of corroboration (section 6.7).

The existing Scots regime, with its full-blooded corroboration requirement, might be thought to guard quite jealously against the risk that a false confession will result in a conviction, though the treatment of “self-corroborating” confessions undermines this to some extent. If the corroboration requirement were removed without replacement, the law would be adopting exactly the opposite attitude.

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1 There exists no general definition of “confession evidence” in Scots law – see below.
6 Such an argument has been noted in the Scottish context: D Nicolson and J Blackie, “Corroboration in Scots law: ‘archaic rule’ or ‘invaluable safeguard’?” (2013) 17 Edin LR 152 at 157-158.
7 For the current law on self-corroborating confessions, see ch 3.5. Self-corroborating confessions are discussed in more detail later in this chapter.
6.2. The current Scottish position

In the context of judicial examinations, “confession” has been interpreted to mean a “statement [that] is clearly susceptible of being regarded as... incriminating.” In contrast with the law of England and Wales, subsequent discoveries of the falsity of a statement can turn an exculpatory statement into a “confession” for the purposes of a judicial examination. This understanding of a confession will be used here, but it is entirely possible that – outwith the context of judicial examinations – the term “confession” might possess a different meaning. Certainly, conduct (which is difficult to describe as a “statement”) can be a “confession” in Scots law.

Admissibility of confessions

The rules regarding the admissibility of extra-judicial confessions (not made in the course of a precognition) have not changed dramatically since the 1950s. The general test of admissibility is whether the statement was obtained fairly. Although sometimes explained in terms of the voluntariness of the accused’s statement (see, most famously, Chalmers v HM Advocate) it is clear that voluntariness is simply an aspect of fairness to the accused. Fairness to the accused seems, in some cases, to be the paramount concern, rather than a factor to be balanced against the public interest in the conviction of the factually guilty. Misconduct on the part of the person eliciting the confession is not necessary for a finding of unfairness.

The fairness test has been employed typically by reference to individual factual situations, rather than general principles. The question of what constitutes unfairness is thus “almost impossible to
answer”, without detailed knowledge of the facts of a particular case. Some relevant factors to take into account when considering fairness include the age of the accused, her physical state, and her language skills. Obviously, following Cadder v HM Advocate, the wrongful denial of legal assistance by the police to a suspect who has requested it will result in any confession being inadmissible, lest the proceedings be rendered unfair. Beyond this, nothing of general assistance can be said with confidence. A particular concern is situations where the accused confessed not to a police officer (with the protections accorded to suspects), but to another citizen. It is not entirely clear how the fairness test operates here, but it is submitted that the trial judge ought to think very carefully about the risks of unreliability and/or fabrication in such circumstances. (This differentiated approach towards confession evidence, which depends on the identity and role of the person confessed to, is returned to below.)

In terms of procedure, the trial judge makes the decision on the admissibility of a confession, with the jury (if there is one) being sent out.

Police informants and fairness

In relation to confessions obtained via police informants, attention must be paid to Allan v UK. There, the police had told Allan’s cellmate (an informant) to “push [Allan] for what you can”. In the light of the defendant’s decision to exercise his right to silence, and the resorting by the police to a “quasi-interrogation” through an informant, the European Court of Human Rights found that article 6 of the ECHR had been breached through the admission of the evidence. Similar principles will apply to other citizens who have been directed by the police to secure information from a suspect. As informants are dealt with elsewhere in this report, nothing more will be said about them here.

Eavesdropping

As long as there is no allegation of entrapment by the police (the situation is less clear with regard to private citizens), overheard confessions are admissible in evidence. Again, the general concern is with the fairness of admitting the evidence. If the police manufacture a situation where the accused confesses in a manner that can be overheard, it is likely that the evidence will be inadmissible unless appropriate authorisations have been sought under the Regulation of Investigatory Powers

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21 HM Advocate v Aitken 1926 JC 83 (16, physical illness, unusual mental condition, absence of caution and no legal advice); Chalmers v HM Advocate 1954 JC 66 (16, subjected to “cross-examination” and “bullying”); Codona v HM Advocate 1996 SCCR 300 (14, subjected to “cross-examination”). Suspects under 16 years of age will be considered potentially vulnerable, following T v UK; V v UK (2000) 30 EHRR 121.
23 HM Advocate v Regufe 2003 SCCR 579.
25 Haggarty v HM Advocate 2013 JC 75 at para 12 per Lord Drummond Young.
28 At para 52.
29 See ch 7.
30 See Jamieson v Annan 1988 SLT 946.

(Scotland) Act 2000. Where such authorisation has been sought, the question will revert to being one of fairness to the accused.

Admissibility of evidence found via an inadmissible confession

A concern with fairness is also present in cases involving evidence found as a result of an inadmissible confession, also known as the “fruit of the poisoned tree”. Such evidence will typically be admissible, as long as no reference is made to the inadmissible confession. Sometimes, however, the finding of the “fruit” will be “part and parcel of the same transaction” as the excluded confession, which will merit exclusion. It is submitted that this accords, broadly, with the position in England and Wales: there, evidence obtained as a result of information contained in an excluded confession is admissible, but sometimes the unfairness involved in the securing of the confession will be so gross as to render the “fruit” inadmissible. There seems no real reason to change the Scottish position regarding “fruit of the poisoned tree”, if the safeguard of corroboration is removed. The existing law appears to take seriously both the principle that relevant evidence should be admissible, and the essential protection of the accused’s rights.

Sufficiency

With regard to sufficiency of evidence, confessions must presently be corroborated by evidence from an independent source that is consistent with the accused’s guilt. There must be independent evidence implicating the accused in the offence – it is not sufficient to prove merely that the offence took place. “What precisely is required to corroborate a confession will depend upon the facts and circumstances of the case and the nature and circumstances of the confession.” The overview of the law of corroboration in chapter 3 of this report contains some discussion of corroborative issues around confession evidence. The law’s approach to “self-corroborating” confessions is particularly liberal in modern times, and – if a corroboration requirement is retained in relation to confessions – serious thought should be given to reversing this trend.

6.3 Removing corroboration without replacement

If the corroboration requirement was removed, and no other changes were made to Scots law’s treatment of confessions, the law would continue to deem unfairly obtained confessions inadmissible. This would allow Scottish courts to respond to underhand or oppressive tactics by those seeking to elicit confessions, though it is not clear how effective this response would be in preventing such tactics. Those seeking to make a suspect confess might well be ignorant of the rules of evidence, or fail to think about a potential trial at all. If the concern is prevention, other

31 HM Advocate v Higgins 2006 SLT 946.
33 See Davidson, Evidence (n 11) para 9.64.
34 Chalmers v HM Advocate 1954 JC 66 at 76 per Lord Justice-General Cooper.
35 Police and Criminal Evidence Act 1984 (PACE) ss 76(4)-76(5), 78.
36 Dickson, Law of Evidence in Scotland (n 2) para 352; Connolly v HM Advocate 1958 SLT 79.
37 Ross and Chalmers, Walkers on Evidence (n 22) para 9.2.3.
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protections may well be more effective. For instance: the caution at the start of the police interview;\(^\text{39}\) the right to legal assistance (where this is not waived);\(^\text{40}\) the recording of the interview (preferably on video, which does not happen routinely in scotland);\(^\text{41}\) and strict time limits on pre-charge detention.\(^\text{42}\)

the protections mentioned in the previous paragraph are, of course, not going to be available where the suspect confesses outwith the confines of police interview. it is submitted that confessions made outwith the context of police interview should be subjected by the trial court to the most searching scrutiny, given the risk of unreliability, before they are admitted. there does, however, not appear to be a case for confessions outside of the interview context to be excluded automatically.

without corroboration, scots law’s approach to confession evidence would be broadly in line with, though less prescriptive than, that adopted in england and wales. it is useful, for comparative purposes, to explain the english position briefly.

the law of england and wales

section 76 of the police and criminal evidence act 1984 (pace) provides for two specific situations in which a confession might be rendered inadmissible. “confession’, includes any statement wholly or partly adverse to the person who made it, whether made to a person in authority or not and whether made in words or otherwise”.\(^\text{43}\) to amount to a “confession”, the statement must prove adverse to its maker’s interests at the time it is made: the fact that a statement is later shown to be a lie does not render it a “confession”.

oppression

the first situation where a confession will be rendered inadmissible is where the defendant alleges that the confession was the product of oppression, and the crown is unable to prove beyond reasonable doubt that this allegation is false.\(^\text{45}\) if the crown can, at a voir dire,\(^\text{46}\) prove beyond

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\(^\text{39}\) see hm advocate v docherty 1981 jc 6 (defective caution rendered confession inadmissible); tonge v hm advocate 1983 jc 130 (ditto). cf custerson v westwater 1987 sccr 389 (the omission of the caution was not an attempt to take advantage of the suspect, and so the confession was admissible). the general test is, as always, “fairness”: hm advocate v middler 1994 sccr 838 at 840 per lord marnoch.

\(^\text{40}\) the fact that suspects waive the right to legal assistance regularly is a cause for concern: b sangero, “miranda is not enough: a new justification for demanding ‘strong corroboration’ to a confession” (2006-2007) 28 cardozo lr 2791; f leverick, “the right to legal assistance during detention” (2011) 15 edin lr 352 at 367-368. it would presumably be utterly impractical, however, to require legal assistance to be given to every person who wishes to confess: i dennis, “miscarriages of justice and the law of confessions: evidentiary issues and solutions” [1993] pl 291 at 309.

\(^\text{41}\) the current provisions in the criminal procedure (scotland) act 1995 allow a suspect (except in very limited circumstances) to be detained for up to 24 hours: ss 14-14a. this is much lower than the total of 96 hours for which an english suspect can be held (after 36 hours, the decision on extension is authorised by a magistrates’ court, not the police): see pace ss 41-44.

\(^\text{42}\) pace s 82(1).

\(^\text{43}\) hasan (sub nom z) [2005] ukhl 22.

\(^\text{44}\) pace s 76(2)(a).
reasonable doubt that the confession is not the product of oppression, the confession will be admissible (unless another ground of inadmissibility is established). If the defendant then raises the matter of oppression afresh before the jury, the jury will be asked whether it thinks there was oppression. If there was, it should not rely on the confession. This gives the defendant “a second bite at the cherry”.

Oppression is defined in section 76(8) of PACE to include “torture, inhuman or degrading treatment, and the use or threat of violence (whether or not amounting to torture)”. This definition was not cited in the case of Fulling, where a far wider (dictionary-based) understanding of oppression was adopted by the Court of Appeal: “Exercise of authority or power in a burdensome, harsh, or wrongful manner; unjust or cruel treatment of subjects, inferiors, etc.; the imposition of unreasonable or unjust burdens.” It was made clear in Fulling that oppression will require impropriety on the part of the person who has elicited the confession, but need not involve violence or the threat of violence. For instance, the forcing of a suspect to deny his involvement in an offence 300 times over 13 hours will constitute oppression, rendering his admission of guilt (at the 301st time of asking) inadmissible.

English law’s refusal to admit confessions obtained through oppression can be justified on a number of theoretical bases, which could also be used to justify Scots law’s concern with fairness. First, the finding of inadmissibility might discourage the police (and others) from employing unfair means to gain a confession. It might be wondered whether this is the courts’ role, and indeed there have been indications in England and Wales that the answer is “no”. Additionally, it must be asked whether a finding of inadmissibility would be the most appropriate way to encourage the police to follow procedure. Surely personal criminal or civil liability for resorting to oppression would be more likely to focus minds. Finally, in the light of the fact that the vast majority of defendants plead guilty, very often the question of oppression will never be aired in court.

Secondly, the exclusion of evidence gleaned through oppression might vindicate the right of the accused to remain silent (and any other rights that were interfered with).

Thirdly, it could be argued that refusing to admit confessions obtained through oppression upholds the moral legitimacy of the criminal justice system. The finding of inadmissibility allows the courts...
to avoid becoming complicit in oppressive behaviour through (implicitly) condoning it, and shows due regard for suspects’ rights not to be forced to admit their involvement in an offence.

Scots law’s concern with fairness would allow a trial court to refuse to admit a confession obtained through oppression, though this would not happen simply on the basis that the Crown failed to prove there was no oppression (see below). The abolition of the requirement of corroboration would not change this.

A risk of unreliability arising from things said or done

The second circumstance in which section 76 of PACE would render confession evidence inadmissible is where the defendant made the statement “in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof”. Note that the likelihood, rather than the fact, of unreliability can merit a finding of inadmissibility.

The courts have interpreted this provision of PACE relatively narrowly, making a finding of inadmissibility on this ground quite unlikely. A clear example of when the courts will regard a confession as inadmissible on the basis of an inducement is Roberts. Roberts was suspected of stealing an iPod from his place of work. His manager saw him with the iPod and told him that, if Roberts confessed to the theft, the matter would be dealt with internally. The manager added that a failure to confess would result in the police being called. Roberts confessed, and the manager called the police. The English courts had no qualms about excluding Roberts’ confession.

It is submitted that Scots law’s fairness test would lead to the same conclusion in a case like Roberts: the evidence would be inadmissible. There is good reason to think that Scottish courts would be similarly unlikely to exclude a confession where the allegation is that something done or said by another person induced the accused to confess. For instance, in Stewart v Hingston, a suspect was told that, if she did not make a statement, she would be taken to the police station and the social work department would take the children she was looking after. This was found not to be an unfair inducement, but rather a setting out of the suspect’s options. True, but those options put rather a lot of pressure on the accused to speak to the police officer immediately, rather than at the police station. As the editors of Walker and Walker suggest, the decision in Stewart v Hingston “appears to view the question of inducement from the perspective of whether the police officer has acted wrongly rather than from the point of view of the accused”. The point of view of the accused should be preferred over concerns of propriety: if a person has been induced (with or without fault) to talk, then her right to silence has plausibly been undermined. There is an intuitive unfairness involved in convicting a person on the basis of evidence secured from her in anything but a voluntary

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58 PACE s 76(2)(a).
60 See e.g. Goldenberg (1989) 88 Cr App R 285.
62 See e.g. Harley v HM Advocate 1995 SCCR 595 (suspect told his girlfriend’s flat would be searched if he did not co-operate by making a statement).
63 1997 SLT 442.
64 At 444 per Lord Justice-General Hope.
fashion, and the moral integrity of the criminal justice system is threatened by reliance on information gained through more extreme examples of inducement and trickery.

An adverse effect on the fairness of proceedings

Even if there is no allegation of oppression, or that something was said or done to create a risk of likely unreliability, English courts can exclude confessions where their admission would have an adverse effect on the fairness of the trial. Section 78 of PACE creates a general discretion to exclude evidence that might have this impact, and this has resulted in the exclusion of confession evidence in the past.

Again, where it is “unfair” to admit a confession, the current Scots case law could allow trial judges to refuse to do so. Ultimately, then, Scots law, shorn of the corroboration requirement, can achieve the same results as English law when it comes to dealing with confessions that it would be unfair to admit for reasons unrelated to their reliability.

It is perhaps advantageous, though, that English law focuses judicial attention on oppression and things said or done that create a risk of unreliability. These are factual situations where the risk of unfairness, and unreliability, are particularly acute, but surely there are other situations (for example, where the defendant was vulnerable) where special care should be taken. Nothing stops Scottish judges from considering particularly risky scenarios such as oppression, inducement and vulnerability with special care, paying close attention to the possibility of unfairness to the accused.

Although a statutory list of particularly concerning confession situations might be imagined, it is not clear that one is necessary. The difficulties involved in creating a comprehensive statutory list would be considerable.

The standard of proof

One potential advantage of the English model over the envisaged post-corroboration Scottish one is that, south of the border, the Crown must prove beyond reasonable doubt the absence of oppression/that a risk of likely unreliability was created by something said or done. (The situation regarding section 78 of PACE is more opaque.)

The beyond reasonable doubt standard demonstrates “how seriously Parliament takes the responsibility of monitoring the quality of confession evidence.” This position can be contrasted with Scots law, where the weight of authority points towards fairness having to be established by the Crown on the balance of probabilities. It has been argued by Sir Gerald Gordon that the Crown should be required to prove

66 A trial judge who decides that the trial will be unduly unfair if the evidence is admitted would surely be bound to exclude the evidence. Cf Criminal Justice Act 2003 s 101(3).

67 See Mason [1988] 1 WLR 139, where the police lied both to a suspect and his solicitor. It appears that it was only the lie to the solicitor that led to exclusion under s 78.

68 A virtue lauded in Sangero (n 40) at 2808.


70 Roberts and Zuckerman, Criminal Evidence (n 5) 523.

71 There is Scottish authority for the proposition that fairness must be established beyond reasonable doubt: HM Advocate v Jenkinson 2002 SCCR 43 at 47 per Lord McEwan. The balance of authority nevertheless suggests that this is too demanding a standard: Ross and Chalmers, Walkers on Evidence (n 22) para. 9.12.2 n
beyond reasonable doubt that the confession should be admitted. This approach works, as in England and Wales, where the Crown is charged with proving beyond reasonable doubt the absence of an event – the conduct giving rise to oppression, or the thing said or done that could create a likelihood of unreliability. Requiring the Crown to prove a normative concept such as “fairness” beyond reasonable doubt is, however, problematic. Indeed, even requiring the Crown to prove that admissibility of the evidence would be fair on the balance of probabilities (the current Scots position) is difficult conceptually. The balance of probabilities standard nevertheless accords with the current position, and presumably means in practice that more attention is paid to confessions whose admission would be unfair than would otherwise be the case. Thus it might be advisable to clarify in statute that the Crown must satisfy the trial judge that it is more likely than not that it is fair to admit the accused’s confession.

Sub-conclusion

If the requirement of corroboration was to be abolished, and the remaining law on confessions remained unchanged, Scots law would be in a broadly similar position to English law. English law would arguably take the matters of oppression and inducements more seriously, because of its requirement that the Crown establishes admissibility beyond reasonable doubt. Apart from this, Scots law’s concern with fairness would help to weed out both true and false confessions obtained through unfair means, whether by violence, inducement or trickery.

More difficult to deal with are false confessions that are made in circumstances where there has been no manifest unfairness on the part of investigators or third parties. The next section explains why the matter of false confessions deserves attention in a post-corroboration Scotland.

6.4 The risks of false confessions

It will be remembered that the intuitive persuasiveness of confession evidence stems from the fact that a statement against interest is thought more likely to be true than false. There are, however, numerous instances where false confessions have led to wrongful convictions. In the US, for example, in what has come to be known as the “Central Park Jogger case”, five suspects were wrongfully convicted of the assault and rape of a female runner, all five of whom “confessed” to the crime. In the Netherlands, there were false confessions in three of four case studies of

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157. See e.g. Thompson v Crowe 2000 JC 173 at 192 per Lord Justice-General Rodger (based on a Crown concession); Platt v HM Advocate 2004 JC 113 at para 10 per Lord Justice-General Cullen (justifying the lower standard on the basis that the presumption of innocence was not having to be overcome). The standard was viewed as “apparently” being on the balance of probabilities (by reference to Thompson v Crowe) in HM Advocate v McSween 2007 SLT 645 at para 15 per Lord Justice-General Hamilton.

72 See Sir Gerald Gordon’s commentary on Thompson v Crowe at 1999 SCCR 1050-1051.

73 See ch 4, where it was noted that false confessions were made in 15 and 16 per cent respectively of wrongful conviction cases in the two leading US exoneration studies.

74 The most comprehensive discussion of the legal aspects of the case can be found in A Leo and others, “Bringing reliability back in: false confessions and legal safeguards in the 21st century” (2006) 2 Wisconsin LR 479.

75 Leo and others (n 74) at 480. It was subsequently established beyond any doubt that they were factually innocent and several years later another person was convicted.
wrongful conviction discussed by Brants.\textsuperscript{76} In Canada, Thomas Sophonow was wrongfully convicted on the basis of a confession that, according to the inquiry into the case, he himself came to believe.\textsuperscript{77} In England, Timothy Evans, who was executed for the murder of his daughter but subsequently exonerated via a royal pardon in 1966, confessed to the crime.\textsuperscript{78}

Why would someone confess falsely to a crime, in the absence of “unfair” practices? The social science literature indicates that there are myriad reasons for confessing falsely to a crime. For instance, the confessor might desire to: avoid a “worse” outcome than conviction;\textsuperscript{79} protect a loved one; or brag/seek attention.\textsuperscript{80} The confessor might be mentally vulnerable or ill;\textsuperscript{81} in this context it is worth noting that false confessions are disproportionately common among juvenile suspects and suspects with “cognitive impairments or psychological disorders”.\textsuperscript{82} That is not to mention simple fabrication of a confession by investigators (a matter which would, if the allegation of fabrication was credible, result in exclusion of the evidence on the grounds of fairness to the accused), or a third party (such as a cellmate). There are obvious dangers associated with premising convictions on the basis of false confessions. A grave injustice is done to the wrongfully convicted person, and the factually guilty offender remains at large, with the police investigation concluded.

Insofar as is known, Scotland has not had great problems with false confessions to date. The requirement of corroboration has insisted on the accused’s guilt being established by evidence from a source independent of the accused (except, to an extent, in “self-corroborating” confession cases), which limits the risk that a false confession will lead to a wrongful conviction. If the requirement of corroboration is abolished, then the risks associated with false confessions might become more significant. It is impossible to know the extent of these risks.

It is assumed in this chapter that it would be unduly costly to the criminal justice system to ignore confessions altogether, on the basis that some will be false.\textsuperscript{83} True confessions, when not obtained by unfair means, are very useful in proving factual guilt. So automatic inadmissibility, although effective at avoiding wrongful convictions on the basis of false confessions, is not a feasible option. The criminal justice system is rightly concerned with a measure of “crime control”, so long as this goal is pursued in a manner consistent with individual rights. A more nuanced approach to confession evidence should be adopted over a rule of automatic exclusion, and the next sections discuss how this might impact on different varieties of false confession.

\textsuperscript{76} C Brants, “Tunnel vision, belief perseverance and bias confirmation: only human?”, in C R Huff and M Killias (eds) \textit{Wrongful Convictions and Miscarriages of Justice} (2013) at 161.
\textsuperscript{77} See Manitoba Justice, \textit{The Inquiry Regarding Thomas Sophonow} (2001) at 91.
\textsuperscript{79} See e.g. \textit{Boyle v HM Advocate} 1976 JC 32 (soldier confessing to a robbery in order to be sent to a civilian, rather than a military, prison).
\textsuperscript{80} \textit{Flanagan} [2005] EWCA Crim 2286; \textit{Lawless} [2009] EWCA Crim 1308.
\textsuperscript{81} \textit{Ward} [1993] 1 WLR 619.
\textsuperscript{82} S M Kassin and others, “Police-induced confessions: risk factors and recommendations” (2010) 34 Law and Human Behavior 3 at 30. See also S Drizin and R Leo, “The problem of false confessions in the post-DNA world” (2004) 82 North Carolina LR 891 at 919-920 (examining the psychological research) and 963-974 (examining the wrongful conviction cases).
\textsuperscript{83} Dennis (n 40) at 305.
Fabricated false confessions

The most obvious type of fabricated confession is one made up by investigators or a third party, such as a cellmate. It is assumed that modern Scottish police officers are above fabricating confessions. If such fabrication was alleged, then the Crown should have to establish (on the balance of probabilities – see above) that it is fair to admit the confession, and that should involve disproving any allegation by the accused that the confession has been fabricated. If confessions are (preferably video-) recorded, then this burden should not prove too difficult in most cases involving the police. (Obviously not everything surrounding the confession can be recorded, so there is no room for complacency.) Recording of police questioning of suspects may assist in providing proof here, and that issue is discussed elsewhere in this report.

The obvious risk that a cellmate might concoct a false confession, in the hope of avoiding prosecution, a harsh sentence, or a denial of parole, etc is, however, always going to be present. This has led some jurisdictions to provide for mandatory or discretionary jury directions in such cases, a matter returned to in chapter 7. Obviously, the recording of such confessions is going to be more difficult than in the police station. A similar problem exists in relation to confessions to private citizens. One solution would be to require suspects to confirm (i.e. give) a subsequent confession to the police, after having been cautioned, offered legal assistance, and on video, etc., but this might be impractical. Another, perhaps preferable, solution would be to require the trial judge to take the risk of unreliability very seriously in cases where there is no independent, verifiable record of the confession having been made. If the trial judge thinks it is acceptable to admit the confession, then the jury (if there is one) can be directed on the dangers of fabrication/distortion (see, further, below).

Voluntary false confessions

The empirical research indicates that not all voluntary confessions will be true confessions. The general Scots “fairness” test, and associated protections such as the right to legal assistance, etc., cannot hope to address all false voluntary confessions in the police station. The suspect might appear to be fully cooperative to the police and a lawyer. This section discusses, briefly, why false voluntary confessions are worth taking seriously, in the light of the proposed abolition of the requirement of corroboration.

It is important to note two important caveats before proceeding. First, the survey of the available literature here is brief. The scholarship in this area is vast. Secondly, there is no reliable way of measuring the rate of false confessions. Not all persons who confess falsely will later retract the confession, and not all of those who retract a confession will have falsely confessed.

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84 In support of video recording, see: Leo and Ofshe (n 4) at 494; K Roach, “Unreliable evidence and wrongful convictions: the case for excluding tainted identification evidence and jailhouse and coerced confessions” (2007) 52 Crim LQ 210 at 232; Sangero (n 40) at 2825.
85 See further ch 10.
86 Leverick (n 40) at 372-375.
87 See the sources cited in the articles mentioned below. A useful introduction is B Sangero and M Halpert, “Proposal to reverse the view of a confession: from key evidence requiring corroboration to corroboration for key evidence” (2010-2011) 44 University of Michigan Journal of Law Reform 511 at 516-523.
There are three main points that can, however, be taken from the existing literature. First, as noted already, confession evidence is inherently prejudicial and difficult for persons to separate from other evidence.\(^{88}\)

Secondly, false confessions occur more often than might be thought, as a result of a range of pressures that can make even “normal” individuals confess to offences that they did not commit. A range of internal (suspect-specific) and external (arising from the interrogation context) factors can lead to a false confession being made. These will not only operate on vulnerable persons, but could cause a “normal” person to falsely confess to an offence in the right circumstances.\(^{89}\)

Thirdly, investigators, lawyers and jurors are not as good at spotting false confessions as might be hoped. One famous study found that police investigators were worse than university students at telling true from false confessions.\(^{90}\) It has also been suggested that jurors tend to believe that false confessions arise rarely from police interrogation, when this is an empirically doubtful proposition, at least in other jurisdictions.\(^{91}\)

It is worth explaining briefly why certain aspects of the criminal justice system’s processes can result in false confessions being made. Writing in the context of US jurisdictions, Leo and Davis identify seven psychological processes involved in explaining why false confessions lead to wrongful convictions: (i) misleading specialised knowledge (information that it appears only the offender would know, which has in fact been “fed” to the suspect by police, perhaps unintentionally, or by a cellmate); (ii) tunnel vision and confirmatory bias (investigators focussing on one suspect and paying attention only to evidence that supports her guilt);\(^{92}\) (iii) motivational biases (the investigator’s quest to convict);\(^{93}\) (iv) the suspect’s emotions (which police officers are often trained, in the jurisdictions discussed by Leo and Davis, to manipulate); (v) institutional influences (the pressure to “solve” cases quickly); (vi) inadequate knowledge about the risks of confessions being false; and (vii) the progressive filtering of relevant information from police investigation, to the evidence presented at trial.\(^{94}\) It is, of course, not clear the extent to which these problems would arise in Scotland – nobody has carried out the relevant empirical research.

The importance of the training received by police investigators is also often emphasised by social scientists. Leo and Ofshe posit that the training received by some US investigators encourages the use of techniques proven to result in false confessions.\(^{95}\) Coercive interrogation techniques are

\(^{88}\) See Kassin and Neumann (n 3).
\(^{90}\) S M Kassin and others, “I’d know a false confession if I saw one’: a comparative study of college students and police officers” (2005) 29 Law and Human Behavior 211.
\(^{91}\) I Blandón-Gitlin, K Sperry and R Leo, “Jurors believe interrogation tactics are not likely to elicit false confessions: will expert testimony inform them otherwise?” (2011) 17 Psychology, Crime and Law 239.
\(^{92}\) See ch 4.
\(^{93}\) See ch 4.
\(^{95}\) Leo and Ofshe (n 4) at 492. See also Dennis (n 40) at 306.
viewed as being a major cause of false confessions.\textsuperscript{96} It is crucial that interview training for police officers seeks to ensure that, in a post-corroboration Scottish criminal justice system, false confessions are avoided, rather than caused, by police practices. Once again, no such training can be provided to help avoid the risk that a person confesses falsely to a private citizen. This is another reason why the fairness of admitting such confession evidence should be considered particularly carefully by the trial judge.

There may be lessons that the Scottish police could take from the literature, to inform the manner in which they question persons who appear to be confessing to the commission of an offence. For instance, Leo and Ofshe suggest the following \textit{indicia} of the reliability of a confession: (i) the fact that a confession leads to the discovery of information previously unknown to the police (such discoveries are presumably motivated by a corroboration requirement, such as that found at present in Scots law); (ii) the presence of special knowledge in the confession (though see the discussion of “special knowledge confessions” in Scots law in chapter 3); and (iii) the knowledge by the confessor of mundane details that are unlikely to have been made public (for instance, what the complainer was wearing). They encourage police investigators (and other players in the criminal justice process) to pay attention to the mundane details, as these are most likely to be stated incorrectly by someone who is confessing falsely.\textsuperscript{97} The indicator of reliability is, apparently, the overall “narrative” of the confessor’s story, rather than a discrete admission, such as “I did it”.\textsuperscript{98}

What this research demonstrates is that there is good reason to think that, with the corroboration requirement abolished, Scots law’s approach to confession evidence would increase the risk of false confessions being relied upon, though it is impossible to know to what extent. There is no reason to think that a post-corroboration Scotland will not encounter similar difficulties to those exposed in the social science literature, which is often focussed on US jurisdictions. The next sections outline various levels of response to the risks associated with false confessions. These might be considered separately, cumulatively, or in different combinations.

\textbf{6.5 Judicial directions}

The lowest level of response to the risks of false confessions leading to wrongful convictions would be for the trial judge to direct the jury about the risk of false confessions in relevant cases.

\textit{Fabricated confessions}

In relation to allegedly fabricated confessions, such judicial directions would draw the jury’s attention towards the reasons why the witness who gives evidence that the accused confessed might be lying. In England and Wales, for example, a direction about the dangers of relying on a cellmate’s account of the defendant’s confession is usually given, which explains the (common sense) risks involved in accepting such testimony unreflectively.\textsuperscript{99} It has been argued that this


\textsuperscript{97} Leo and Ofshe (n 4) at 439. See also Ayling (n 89).

\textsuperscript{98} Leo and Ofshe (n 4) at 495.

\textsuperscript{99} Benedetto [2003] 1 WLR 1545. See also Evidence Act 1995 ss 165(1)(e) and 165(2) (Cth).

direction should be given in all cases involving cell confessions,\textsuperscript{100} but it is not. The trial judge retains the discretion to tailor her directions to the case. If the cell confession would be difficult to invent, or the witness has not been cross-examined on a potential motive to lie, no special direction is required.\textsuperscript{101} A similarly permissive approach is taken in relation to other witnesses who might have a motive to lie, including accomplices.\textsuperscript{102}

Similar rules apply in relation to accomplices and cell confessions in Canadian law, following the Supreme Court of Canada’s decision in \textit{Vetrovec}.\textsuperscript{103} Convictions are, apparently, overturned regularly on the basis that a warning about a suspect witness was omitted.\textsuperscript{104} There is no set form of wording for \textit{Vetrovec} directions, though the trial judge should: (1) draw attention to the suspect evidence; (2) explain why the evidence should be subjected to special scrutiny; (3) caution the jury about the danger of convicting on the unconfirmed evidence (but remind them that they can convict if convinced the evidence is true); (4) tell the jury to look for independent, supportive evidence.\textsuperscript{105} Dufraimont claims that one deficiency with such warnings is that they do not mention how easy it might be for cellmates to gather information that might appear to be “special knowledge”, that only the factually guilty party would know.\textsuperscript{106} It is worth noting in this context that in the Innocence Project’s sample of DNA-based exonerations in the US,\textsuperscript{107} false evidence given by accomplices or informers was one of the leading causes of wrongful conviction and this testimony often contained details about the crime that would only have been known to the perpetrator.\textsuperscript{108} This might have come from the defendant himself, who would by this time have been questioned by the police and would be aware of at least some of the evidence in the case. Alternatively, it may be that there had been a public hearing by this point where some of the evidence was presented, or that the suspect knew via the general jailhouse network.\textsuperscript{109} The jury might well be ignorant of such matters, and so it might be advisable for the trial judge to mention them in her directions.

\textit{Voluntary false confessions}

Pattenden suggests that, where a disputed confession forms the main plank of a prosecution case, the jury should be directed as follows: (1) the jury should be told that false confessions have led to wrongful convictions in the past; (2) the jury should be warned of the need to exercise caution before convicting on the basis of a bare confession; (3) the jury should be reminded of supporting

\footnotesize{\begin{itemize}
\item \textsuperscript{100} L Toczek, “Cell confessions” (2002) 152 NLJ 805.
\item \textsuperscript{101} \textit{Stone} [2005] EWCA Crim 105 at para 84 per Rose LJ.
\item \textsuperscript{102} \textit{Beck} [1982] 1 WLR 461.
\item \textsuperscript{104} L Dufraimont, “Regulating unreliable evidence: can evidence rules guide juries and prevent wrongful convictions?” (2007-2008) 33 Queen’s LJ 261 at 276.
\item \textsuperscript{105} \textit{Khela} [2009] 1 SCR 104. These four points appear in the opinion of the majority (Binnie, LeBel, Fish, Abella, Charron and Rothstein JJ). Deschamps J thought the fourth condition was “unnecessary and unworkable” (at para 73). The supportive evidence needs to corroborate the evidence of the accomplice, rather than the identity of the defendant as the offender: \textit{Kehler} [2004] 1 SCR 328.
\item \textsuperscript{106} Dufraimont (n 104) at 297.
\item \textsuperscript{107} B L Garrett, \textit{Convicting the Innocent: Where Criminal Prosecutions Go Wrong} (2011). For further discussion of this research, see ch 3.
\item \textsuperscript{108} Garrett, \textit{Convicting the Innocent} (n 107) 131.
\item \textsuperscript{109} At 134.
\end{itemize}}
evidence (if any); (4) the jury should be reminded of any specific weaknesses in the confession (if any); and (5) the jury should be reminded of the circumstances in which the confession was made.

Pattenden is correct to require that the confession be the main piece of evidence before such a warning is given. The danger of giving a direction is that it perhaps increases the perceived significance of the relevant piece of evidence in the jurors’ minds. General concerns about the comprehension of judicial directions also apply here. There is a risk, if a direction is given in too many cases, the jury will be confused as to how to carry out its role.

6.6 Expert evidence

If judicial directions were not viewed as a necessary or sufficient protection against the risks of false confessions, the next logical step would be to allow an expert to testify on the matter.

The concern is that normal adversarial cross-examination will not educate jurors sufficiently on the risks of false confessions. Dufrainmont suggests a middle ground, whereby trial judges would educate jurors on the risk of relying on false confessions in appropriate cases, with expert evidence being reserved for cases where the allegation is that the trial judge is not sufficiently expert. It would be extremely difficult to determine the appropriate line between these two categories, and thus it is submitted that Dufrainmont’s recommendation would not be an advisable model for reform. If “expert” evidence is to be given, it should come from an expert, not the trial judge.

Different jurisdictions have approached the issue of expert evidence on the risks of false confessions differently. In Canada, experts have not yet been permitted to testify on the dangers of false confessions. In England and Wales, expert evidence on factors such as suggestibility has been recognised as potentially admissible. In Scotland, such expert evidence can also be admitted.

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110 It has been argued that a specific reminder about the dangers of relying on a confession that was not recorded should be made: P A Chickris and M J Fox, “Present danger: preventing wrongful convictions by resolving critical issues within Texas’s criminal justice system” (2010-2011) 52 Texas LR 365 at 377.
113 See ch 9.
115 See also Dufrainmont (n 104) at 287.
116 Dufrainmont (n 104) at 321-324.
117 Dufrainmont (n 104) at 273. Expert evidence was ruled inadmissible in the circumstances by the Ontario Court of Appeal in Osmar (2007) 44 CR (6th) 276.
118 Antar [2004] EWCA Crim 2708 (the relevant evidence was not admitted at trial, but ought to have been); Nolan [2006] EWCA Crim 2983 (expert evidence relating to confession in 1981 led to quashing of conviction in 2006).
119 See Campbell v HM Advocate 2004 SLT 397 (the evidence, led on appeal, led to the quashing of the conviction); Wilson v HM Advocate [2009] HCJAC 58 (the evidence, led on appeal, did not lead to the quashing of the conviction); Allan v HM Advocate [2014] HCJAC 60 (evidence of accused’s vulnerability admitted at trial). Cf. Coubrough v HM Advocate [2008] HCJAC 13 (the expert evidence was not significant enough to be admissible).
An obvious question is whether expert evidence is effective in inducing sensitivity among jurors towards confession evidence. Blandón-Gitlin, Sperry and Leo found that expert evidence about false voluntary confessions had a “significant, but modest” impact on jurors. Jurors still, however, find false confessions compelling, even after expert evidence about its potential unreliability. It is not clear, then, how effective a safeguard against wrongful conviction expert evidence would be. It might also distract the jury from the core issues in the trial, or inflate unnecessarily the perceived value of a confession in the jurors’ minds.

Findley has contended that although there might be room for pessimism regarding the training of jurors (who will, typically, only hear one case), “repeat players” such as judges could be trained about the dangers of false confessions. Such training might be useful for Scottish judges, particularly those with less experience of criminal cases. It would no doubt help judges decide whether to admit the confession evidence, and on the appropriate direction to give to a jury (see section 6.5, above).

6.7 Corroboration

The measures mentioned in the previous sections might not be viewed as enough to guard against wrongful convictions being premised on false confessions. That of course depends on how often false confessions are thought to occur (and there is no way of knowing).

Even if the number of persons convicted on the basis of a false confession would be relatively small, that would not necessarily mean that the Scots fairness test would be sufficient protection against false voluntary confessions. As Sangero has counselled, in a passage which should be borne in mind:

It is enough to observe that, in reality, [convictions based on false confessions] do indeed occur. And, even if the number of innocent persons who are convicted on the basis of false confessions is not high, each such individual is an end in himself and a world unto himself rotting away in jail. We must not ignore such individuals by pinning our hopes on statistics. Furthermore, the statistical picture is not particularly encouraging, since it is very reasonable to assume that, behind each case exposed, there are many more cases in which the truth does not come to light and an innocent person has been wrongfully imprisoned.

At present, with its general requirement of corroboration of the accused’s guilt, Scotland takes seriously (with the exception of “special knowledge” confessions) the risks associated with false, voluntary confessions. Without opening up a general discussion about the virtues of corroboration in general, there are at least three reasons why a corroboration requirement is useful in the context of confession evidence: (i) a corroboration requirement can help to reduce substantially the risk of false confessions leading to unmerited convictions, because other evidence must be available for

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120 For a discussion of juror sensitivity vs scepticism, see ch 9.
121 Blandón-Gitlin, Sperry and Leo (n 91) at 253. See further ch 9.
123 Findley (n 122) at 749. See also Nicolson and Blackie (n 6) at 181.
125 Sangero (n 40) at 2797.
126 See Leo and others (n 74) at 486.
consideration by the court (though the nature of the corroboration requirement will impact upon this point, as will be explained below); (ii) the police are encouraged to continue searching for evidence, rather than focussing on getting a confession, and then giving up the hunt for other evidence once they secure one, perhaps leaving the real perpetrator at large;\(^{127}\) and (iii) the requirement of corroboration can combat the risk that an uncritical jury simply accepts confession evidence and convicts the accused, even though there is a very real risk that he or she is not guilty. It has been seen already that jurors might be bowled over by confession evidence, particularly when no effort is made to warn them of the dangers of false confessions.

Corroboration requirements might vary in their intensity, and it is worth beginning by considering the weak *corpus delicti* rule, which is prevalent throughout much of the US, and the related South African corroboration requirement.

*Corpus delicti*

A number of US jurisdictions have a requirement that there must be independent evidence of a crime’s occurrence before a confession will be admitted.\(^{128}\) Note this is a rule of admissibility, not sufficiency, and it varies according to the State concerned.\(^{129}\)

This bare *corpus delicti* rule is flawed. It can guard against the risk that a person is convicted on the basis of a confession to an offence that never took place, but is next to useless in other false confession cases (including cases of fabrication). This is because the *identity of the offender* does not need to be proved by evidence independent of the confession. As Sangero and Halpert put it:\(^{130}\)

> It is meaningless to ask whether or not a crime was actually committed if this question is asked with regard to a person who was not even involved. When the wrong person is in custody to start, then proof that the offense was committed says nothing about this individual’s involvement or guilt.

This seems correct – the *corpus delicti* rule fails to achieve the end of avoiding convictions based on false confessions.\(^{131}\) Although better than nothing (for those cases where a person has, or is alleged to have, confessed to a crime that never took place), the *corpus delicti* rule seems a poor response to false confessions.

*South Africa*

The main test for the *admissibility* of a confession, under South African law, is whether “such confession is proved to have been freely and voluntarily made by [the accused] in his sound and

\(^{127}\) Sangero (n 40) at 2803.


\(^{129}\) See the seminal, though now slightly outdated, study in Ayling (n 89).

\(^{130}\) Sangero and Halpert (n 87) at 525. See also Sangero (n 40) at 2804.

\(^{131}\) Ayling (n 89) at 1151.
sober senses and without having been unduly influenced thereto”. This is comparable to Scots law’s approach under *Chalmers*.

There is no general sufficiency requirement of corroboration in South Africa. An exception is made for confessions. Section 209 of the Criminal Procedure Act 1977 (Act No. 52 of 1977) provides that:

An accused may be convicted of any offence on the single evidence of a confession by such an accused that he committed the offence in question, if such confession is confirmed in a material respect or, where the confession is not so confirmed, if the offence is proved by evidence, other than such confession, to have been actually committed.

Even when this sufficiency standard is met, the court should refuse to convict the accused if not convinced beyond reasonable doubt of his guilt. In other words, the existence of confirmation in a material respect, or proof that the crime has actually been committed, does not entail that the finder-of-fact must accept the truth of the confession.

Neither part of section 209 offers much more protection than the corpus delicti rule. First, confirmation in a “material respect” might require nothing more than that, as in *R v Blyth*, the accused reveals that she knows the cause of the deceased’s death. This might not point towards her factual guilt: the fact she knew this detail “did not connect her with the offence or even prove that her husband had been murdered”. Secondly, proving the offence took place provides no real assurance that it was the accused who committed it. In other words, the South African approach to confessions is just as flawed as the corpus delicti rule.

A “full-blooded” corroboration requirement

The obvious response to the concerns raised about “light” corroboration requirements is to require that the accused’s identity as the offender also be corroborated. An additional requirement that the accused’s identity as the offender is proved by independent evidence can go some way towards reducing the danger that the confession is false. Outside of Scotland, this level of protection is, however, relatively rare. It can be found in Iowa: “The confession of the defendant, unless made in open court, will not warrant a conviction, unless accompanied with other proof that the defendant committed the offense.” This rule is superior to a bare corpus delicti rule, and the South African rule discussed in the previous section, because it provides another link between the accused and the offence.

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133 s 208.
134 *S v Blom* 1992 1 SACR 649 (report in Afrikaans, headnote in English); *S v Kearney* 1964 2 SA 495 at 501 per Holmes JA; *S v Mbambo* 1975 2 SA 549 at 554 per Galgut JA.
136 *R v Blyth* 1940 AD 355 (decided under previous, similar legislation).
138 Schwikkard and van der Merwe, *Principles of Evidence* (n 135) 533-534.
139 Iowa Code Annotated Rule 2.21(4).
Adopting an approach like that found in Iowa would be broadly similar to the current Scottish rules. Davidson and Ferguson have proposed replication of the current rules on confession evidence, with a more restrictive approach to “special knowledge” confessions being adopted. It is submitted that serious thought should be given to these proposals. The textual study of false confessions reveals that they often contain detail it was believed that only the perpetrator would know. This is demonstrated by Garrett, who examined the content of the 40 false confessions in his sample of wrongful convictions drawn from DNA exoneration cases in the US. An astonishing 38 of them contained details that ought only to have been known to the true perpetrator. He stated that “[t]hese false confessions were so persuasive, detailed, and believable that judges repeatedly upheld the convictions during appeals and habeas review” and concluded that despite the fact that police officers often testified under oath that they did not feed information to suspects, this must have happened, although it may have been inadvertent.

A requirement of corroboration is not, of course, a fool-proof response to the risks of false, voluntary confessions. Supporting evidence can be unreliable (for example, a mistaken analysis of a piece of forensic evidence), or fabricated. A corroboration requirement nevertheless weeds out some particularly weak cases, avoiding the risk that a person is wrongly convicted.

6.8 Conclusion

Confessions are intuitively damning pieces of evidence. Care must, however, be taken to avoid the corruption of the criminal justice system through the premising of convictions on confessions obtained through unfair means. Scots law’s current approach, which looks at the fairness to the accused of admitting confession evidence, deals well with cases where the moral integrity of the criminal justice system is endangered. Further precautions should be taken against the risks associated with false confessions, even when these are not accompanied by any unfairness. It is not implausible that a “full-blooded” corroboration requirement could be retained in relation to confession evidence, and/or some other forms of problematic evidence, but not for others. Such a system would not be too complex to understand, and the idea of corroboration is already well known to criminal justice officials in Scotland.

141 For others who have argued for a full-blooded corroboration requirement in relation to confession evidence, see e.g. Ashworth and Redmayne (n 56) 112; Sangero (n 40) at 2828; Sangero and Halpert (n 87) at 86.
142 Kassin and others (n 82) at 25.
143 Garrett, Convicting the Innocent (n 107) 20.
144 At 21.
145 At 28.
146 Dennis (n 40) at 310.
6.9 Issues for consideration

It is suggested that the Review should consider whether:

(a) jury directions regarding the risks associated with false confessions might usefully be developed for use in appropriate cases;

(b) a requirement of corroboration should be retained in cases where the prosecution rely on confession evidence and, if so, what form it should take;

(c) if a corroboration requirement is retained for confession evidence, whether “special knowledge” should, given the concerns raised about the weakening of the special knowledge requirement in chapter 3.5, be limited strictly to cases where the only reasonable explanation for the information concerned being known to the accused was that he was the perpetrator.
CHAPTER 7: EVIDENCE OF ACCOMPLICES AND INFORMERS

Findlay Stark

7.1 Introduction

This chapter considers those witnesses who have a clear motive to present false testimony against the accused. The main categories of witness envisaged here are socii criminis/accomplices (i.e. those who participated in the planning and/or execution of the crime) and what might be termed “jailhouse informers” (i.e. those who claim that the accused revealed details of the crime to them whilst they were imprisoned together). Other categories of witnesses akin to these can, of course, be imagined (e.g. those with a grudge against the accused).

7.2 The current Scottish position

The present Scottish position on suspect witnesses is found in the decision of a nine-judge Full Bench in Docherty v HM Advocate.¹ No special warning need be given in cases involving a socius criminis, or a jailhouse informer, beyond the normal direction to the jury to consider the criticisms made of a witness by the defence during cross-examination and the defence speech to the jury. As the court put it:²

[T]rial judges need only give to juries in all cases, whether or not any socius criminis has been adduced as a witness for the Crown, the familiar directions designed to assist them in dealing with the credibility of witnesses and any additional assistance which the circumstances of any particular case may require. If, for example, the credibility of any Crown witness, including a socius criminis, is in any particular case attacked by the defence on the ground of alleged interest to load and convict the accused or, indeed, on any other ground, the trial judge will normally be well advised to remind the jury that in assessing the credibility of the witness concerned, they should take into consideration the criticisms which have been made of the witness in the course of the presentation of the defence case.

One ground for such criticism would be the possible incentive/motive for testifying.³ It can thus be assumed that Scottish trial judges have a discretion to point to criticisms of the evidence of accomplices and informers, but that no mandatory warning — or specific form of words — is required. As will be seen, this accords with the position in many Anglo-American systems. It has, however, been suggested that any warning would be wrong where the alleged accomplice is a co-accused, given the co-accused’s entitlement to the presumption of innocence.⁴

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¹ 1987 JC 81.
² At 95. See also O’Donnell v HM Advocate [2011] HCJAC 84 where the court confirmed (at para 68) that: “It is quite evident from what was said in [Docherty] that whether some particular direction should be given in relation to the evaluation of the credibility of some particular witness must be a matter for the discretion of the trial judge to be exercised in the light of the particular circumstances of the case in question.”
³ Docherty at 95 per Lord Justice-General Emslie. No warning is necessary in cases where the witness does not know that, as a socius criminis, he or she will be immune from prosecution, and no issue is made of this point in the defence speech to the jury: Mason v HM Advocate 2000 JC 626.
⁴ Casey v HM Advocate 1993 SLT 33.
7.3 The problematic nature of accomplice evidence

Chapter 4 established that false evidence given by accomplices or informers is one of the leading causes of wrongful conviction. It might be thought that jurors will appreciate that the evidence of those who have something to gain in seeing the accused convicted, or “a temptation to minimise their part in the crime and blacken the accused”, 5 should be treated with caution. The limited empirical research that has been undertaken in this area, 6 however, suggests that this cannot be assumed.

The one study that has been undertaken suggested that even the presence of an incentive offered to an accomplice/jailhouse informant to testify against the accused will not impact meaningfully on the decision to convict. 7 The authors of the study found that “juror conviction rates were unaffected by the explicit provision of information indicating that the witness received an incentive to testify” and that this was “despite the fact that participants perceived the witnesses who received incentives as less interested in serving justice and more interested in serving self-interests”. 8 Although there is (as far as the expert group knows) no empirical evidence on other “suspect” witnesses (i.e. those with a grudge), it might be that juries are not as cautious with such evidence as would be hoped. Psychological research more generally supports this point, suggesting that juries will not necessarily place sufficient weight on the fact someone has a vested interest in testifying. 9

It has also been suggested that the evidence of accomplices and informers might be problematic because such witnesses (who might have given evidence against multiple accused persons) could be “very accomplished liars”. 10 In this context, it is worth noting that one of the most consistent findings of psychological research is that people are extremely poor at detecting when another person is lying, 11 and that mistaken beliefs about the cues by which lying can be detected (such as the belief that liars avert their gaze) are commonplace, 12 which does not augur well for the accurate identification of lying witnesses by juries.

With these points in mind, strong consideration should be given to the adoption of some protective measure(s) in relation to the evidence of accomplices and informers, particularly if the existing protection of the requirement of corroboration is removed.

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5 Dow v MacKnight 1949 JC 38 at 55 per Lord Jamieson.
6 Kassin, writing in 2006, concluded that there was “no published research on the specific question of how jurors use evidence from co-operating witnesses”: see S Kassin, “Judging eyewitnesses: confessions, informants and alibis: what is wrong with juries and can they do better?”, in A Heaton-Armstrong and others (eds), Witness Testimony: Psychological, Investigative and Evidential Perspectives (2006) 345 at 348.
8 At 146.
9 Kassin (n 6) at 358.
11 C F Bond and B M DePaulo, “Accuracy of deception judgments” (2006) 10 Personality and Social Psychology Review 214 (a meta-analysis of 206 studies, in which the authors concluded that the accuracy rate is 54 per cent, barely more than would have been achieved by chance).
7.4 Mandatory, class-based warnings

In a number of Anglo-American jurisdictions (including England and Wales), judges were at one time required to warn the jury about the dangers of relying on the evidence of children and complainers in sexual offence cases. The evidence of these witnesses was, de facto, “suspect”. It has now been recognised in most jurisdictions that simple membership of one of these categories of witnesses does not give rise to special concerns regarding reliability.\(^\text{13}\) In fact, to counteract the culture of assuming certain kinds of witnesses are – as a class – “suspect”, warnings about the need for/desirability of having corroborative evidence to support the complainant’s evidence are prohibited in relation to some (sexual) offences in Canada.\(^\text{14}\) It is assumed here that mandatory warnings about the credibility and reliability of, for example, all child witnesses and sexual complainers are out of place in a modern criminal justice system. Such warnings will not, therefore, be discussed further in this chapter.\(^\text{15}\)

7.5 Overlap with confession evidence

It is useful to note that, in some cases, there will be overlap between the protections around confession evidence\(^\text{16}\) and those around the evidence of accomplices and informers. As noted in chapter 6, there might be a need for extra care in relation to confessions recounted by those with a specific interest in securing the accused’s conviction.

Similar caution should be employed even in cases that do not involve confession evidence. For example, an accomplice might give evidence of the accused’s involvement in the offence, without recounting any confession by the accused. In other words, it should not be assumed that the general rules on confession evidence are sufficient to guard against the risk of wrongful conviction in cases involving accomplices, or other witnesses with a motive to see the accused convicted. The following sections outline alternative protections that might be envisaged for cases of this nature.

7.6 Discretionary warnings

The lowest level of protection would be to give the trial judge the discretion to give a warning about the need for caution (and the reasons for it) when relying on the evidence of a witness who has a potential reason to give false testimony. Such warnings might involve pointing to potentially corroborative evidence or the lack thereof.

Discretionary warnings have been adopted in England and Wales where there is an evidential basis to suggest that a witness may be unreliable. The leading case is \(R v Makanjuola\),\(^\text{17}\) where Lord Taylor stated that:\(^\text{18}\)

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\(^{13}\) See the useful survey in P Lewis, “A comparative examination of corroboration and caution warnings in prosecutions of sexual offences” [2006] Crim LR 889.

\(^{14}\) Criminal Code of Canada s 274. This section applies to a range of sexual offences.

\(^{15}\) For further discussion, see ch 14.

\(^{16}\) Discussed in ch 6.

\(^{17}\) [1995] 1 WLR 1348. Before 1994, the trial judge was required to tell the jury to exercise caution in relation to the accomplice’s testimony, and consider whether there was any corroborative evidence to support it. This warning would also tell the jury that it could convict on the uncorroborated evidence of the accomplice, if
It is a matter for the [trial] judge's discretion what, if any warning, he considers appropriate in respect of such a witness... Whether he chooses to give a warning and in what terms will depend on the circumstances of the case, the issues raised and the content and quality of the witness’s evidence... The judge will often consider that no special warning is required at all. Where, however the witness has been shown to be unreliable, he or she may consider it necessary to urge caution.

The trial judge can, if the circumstances merit it, give a direction that advises the jury to look for supporting evidence before convicting on the basis of the witness’s testimony:19

In a more extreme case, if the witness is shown to have lied, to have made previous false complaints, or to bear the defendant some grudge, a stronger warning may be thought appropriate and the judge may suggest it would be wise to look for some supporting material before acting on the impugned witness’s evidence.

This is not a formal requirement of corroboration, but rather advice to the jury about exercising caution. If the jury finds the witness reliable, and is sure of the defendant’s guilt, they may convict. A similar, discretionary approach is adopted in New Zealand20 and Canada.21

Discretionary warnings are, intuitively, preferable to strict rules, as they allow for flexibility, and avoid witnesses being undermined undeservedly in the direction to the jury. They are, however, less conducive to consistency in approach.

7.7 Mandatory warnings

A second approach would be to require trial judges to give a direction about particular types of witnesses in certain circumstances. In Ireland, a mandatory warning, requiring the jury to look for corroborative evidence before relying on the witness’s testimony, must be given in cases involving *accomplice* evidence.22 In other cases, aside from those involving witnesses in witness protection, warnings are discretionary.23

A different approach to mandatory directions is adopted in most of the Australian jurisdictions.24 There, upon a request from the defence, the jury will receive a warning about the dangers of relying convinced beyond reasonable doubt of the defendant’s guilt. The mandatory warning was abolished by s 32 of the Criminal Justice and Public Order Act 1994.

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18 At 1351.
19 At 1352.
20 See Bailey [1988] 1 NZLR 109. See also ss 121-127 of the New Zealand Evidence Act 2006 which provide a comprehensive statutory scheme governing warnings about potentially unreliable evidence, including the evidence of accomplices and informers. It also includes hearsay evidence, confession evidence and eyewitness identification evidence.
24 At common law, a corroboration warning had to be given in relation to accomplices. For an overview, see Jenkins (2004) 211 ALR 116 at paras 25-35. This rule has been superseded by statute in each Australian jurisdiction: Evidence Act 1995 s 164 (Cth); Evidence Act 1995 s 164 (NSW); Criminal Code Act 1899 s 632 (Qld); Evidence Act 2011 s 164 (ACT); Evidence Act 2008 s 164 (Vic); Evidence Act 2001 s 164 (Tas); Evidence Act 1906 s 50 (WA); Evidence (National Uniform Legislation) Act 2011 s 164 (NT).
on (and resultant need for caution regarding) certain types of evidence, including accomplice and jailhouse informer evidence.\textsuperscript{25} No mandatory rules exist in relation to other witnesses who may have a motive to lie, but there is also no express bar to giving a discretionary warning based on an individual witness. Furthermore, if the prosecution case is based entirely on the testimony of one witness, it is normal for a warning about the need to exercise great care before convicting to be given.\textsuperscript{26}

7.8 Exclusion

Some jurisdictions, for instance New Zealand, countenance the exclusion of accomplice evidence where there is a “real danger that false evidence will be given”.\textsuperscript{27} The English trial judge retains the discretion to refuse to admit accomplice evidence where, in the light of its seeming unreliability, or an inducement such as a reduced sentence, its admission would impact adversely on the fairness of proceedings.\textsuperscript{28} This is obviously more effective than a judicial warning, in the sense that the jury never hears of the “suspect” evidence (and cannot be swayed unduly by it). It nevertheless has the pitfall of removing from the jury the opportunity to weigh the evidence, in the light of all of the other evidence in the case.

7.9 A corroboration requirement

Fifteen US States (and one Territory) apply a corroboration requirement in relation to accomplice testimony.\textsuperscript{29} These vary in their strength (i.e. whether they require corroboration of the defendant’s identity as the offender) and breadth (i.e. the number of offences they apply to).\textsuperscript{30} Some of these corroboration requirements simply require the commission of the offence to be corroborated. They thus suffer from the same pitfalls as the corpus delicti rule regarding confession evidence.\textsuperscript{31} Only a corroboration requirement regarding the identity of the accused as the offender can provide a worthwhile protection against wrongful conviction.

7.10 Conclusion

Despite being identified as a cause of wrongful convictions, evidence given by accomplices and informers does not tend to be subject to many specific rules. The general approach in most jurisdictions is to give the trial judge a discretion over the admission of the evidence of such witnesses and over the direction (if any) to be given to the jury. This approach perhaps reflects the reality that class-based rules are going to exclude potentially useful and reliable evidence, and thus a case-by-case approach is preferable.

\textsuperscript{25} Evidence Act 1995 s 165 (Cth); Evidence Act 1995 s 165 (NSW); Evidence Act 2011 s 165 (ACT); Evidence Act 2008 s 165 (Vic); Evidence Act 2001 s 165 (Tas); Evidence (National Uniform Legislation) Act 2011 s 165 (NT). For a sample direction of this nature, see ch 16.

\textsuperscript{26} Robinson (1999) 197 CLR 162.

\textsuperscript{27} M (2003) 20 CRNZ 215 at para 23 per Anderson J.

\textsuperscript{28} Police and Criminal Evidence Act 1984 s 78. See e.g. McEwan [2011] EWCA Crim 1026.

\textsuperscript{29} S G Thompson, “Beyond a reasonable doubt? Reconsidering uncorroborated eyewitness identification testimony” (2007-2008) 41 University of California Davis LR 1487 at 1533.

\textsuperscript{30} Thompson (n 29) at 1533 n 240.

\textsuperscript{31} See ch 6, where this was discussed in more detail.
7.11 Issues for consideration

It is suggested that the Review should consider whether:

(a) jury directions regarding the risks associated with the evidence of accomplices and informers might usefully be developed;

(b) such directions should be mandatory, or should be given on a discretionary basis, and when (if at all) they might be appropriate in relation to the evidence of a co-accused;

(c) there should be a general exclusionary power giving the trial judge discretion to refuse to admit accomplice evidence where, in the light of its seeming unreliability, or an inducement such as a reduced sentence, its admission would impact adversely on the fairness of proceedings.
CHAPTER 8: HEARSAY EVIDENCE

Findlay Stark

At present, no person accused of crime in Scotland can be convicted solely on the basis of a single piece of hearsay evidence. With the abolition of the requirement for corroboration, convictions could, however, be returned in such cases. This chapter analyses the potential ECHR issues raised by such hearsay cases, and explains why Scots law’s approach to hearsay evidence might be in need of reform. The discussion below applies equally to evidence given by anonymous witnesses, as the European Court of Human Rights (ECtHR) applies the same principles in such cases.

8.1 The law of hearsay in Scotland: a brief overview

Hearsay evidence – that is, evidence of an “assertion other than one made by a person while giving oral evidence in the proceedings” – is generally inadmissible in criminal proceedings in Scotland. At common law, there was an exception to this rule where the maker of the statement was dead, permanently insane or (possibly) a prisoner of war. Following a report by the Scottish Law Commission, the Criminal Procedure (Scotland) Act 1995 now provides that hearsay may be admitted by virtue of its provisions if the person who made the statement:

(a) is dead or is, by reason of his bodily or mental condition, unfit or unable to give evidence in any competent manner;

(b) is named and otherwise sufficiently identified, but is outwith the United Kingdom and it is not reasonably practicable to secure his attendance at the trial or to obtain his evidence in any other competent manner;

(c) is named and otherwise sufficiently identified, but cannot be found and all reasonable steps which, in the circumstances, could have been taken to find him have been so taken;

(d) having been authorised to do so by virtue of a ruling of the court in the proceedings that he is entitled to refuse to give evidence in connection with the subject matter of the statement on the grounds that such evidence might incriminate him, refuses to give such evidence; or

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1 This chapter is thus not a general discussion of hearsay evidence, or indeed of whether the “sole and decisive” test that has emerged in the ECHR context is defensible. The UKSC thinks the rule is indefensible in adversarial systems: see Horncastle [2009] UKSC 14 at paras 105-108 per Lord Phillips. The test has, however, been defended elsewhere. See, in relation to South African law, J D Mujuzi, “Hearsay evidence in South Africa: should courts add the ‘sole and decisive rule’ to their arsenal?” (2013) 17 E&P 347.

2 See Ellis v UK (2012) 55 EHRR SE3. The current Scottish provisions on anonymous witnesses are found in the Criminal Procedure (Scotland) Act 1995 (CPSA 1995) ss 271N-271Z.

3 Morrison v HM Advocate 1990 JC 299 at 312, adopting the definition approved in R v Sharp [1988] 1 All ER 65 at 68.

4 HM Advocate v Manson (1897) 21 R (J) 5 at 9-10.


6 Criminal Procedure (Scotland) Act 1995 s 259(2).
(e) is called as a witness and either—

(i) refuses to take the oath or affirmation; or

(ii) having been sworn as a witness and directed by the judge to give evidence in connection with the subject matter of the statement refuses to do so.

The hearsay evidence is admissible only if (a) direct oral evidence of the matter contained in the statement would have been admissible from the person who made it, (b) that person would have been a competent witness at the time the statement was made, and (c) the statement is contained in a document or the person giving oral evidence of it has direct personal knowledge of the making of the statement.\(^7\)

Provided these statutory conditions are satisfied, the trial judge has no power to refuse to admit the hearsay evidence, unless – exceptionally – its admission would breach the right to a fair trial under article 6 of the ECHR.\(^8\)

8.2 The Al-Khawaja case (and beyond)

Article 6(3)(d) of the ECHR provides that “Everyone charged with a criminal offence [must be permitted]... to examine or have examined witnesses against him”. This right is a minimum guarantee of a fair trial under article 6 of the ECHR, rather than simply a factor to be taken into account when deciding whether a trial was fair.

In Al-Khawaja and Tahery v UK (Al-Khawaja),\(^9\) the Fourth Section of the ECtHR found that, where the sole or decisive evidence against the defendant came from a witness whom he had not had an opportunity to cross-examine, then the guarantees accorded by article 6 (and particularly the guarantee in article 6(3)(d)) were violated.\(^10\) The “counterbalancing factors” in English law’s (convoluted) hearsay regime were, in the Fourth Section’s opinion, insufficient to guarantee a fair trial in such circumstances.\(^11\) The UK Government appealed to the Grand Chamber of the ECtHR.

Whilst the Grand Chamber’s judgment was awaited, the UK Supreme Court (UKSC) rejected the Fourth Section’s “sole and decisive” test, in Horncastle.\(^12\) The UKSC concluded that the “counterbalancing factors” found in English law – viz. the detailed rules about admissibility, and the myriad exclusionary rules, contained mainly in the Criminal Justice Act 2003 (CJA 2003) – were sufficient to ensure a fair trial.

When it arrived, the Grand Chamber (GC)’s decision in Al-Khawaja\(^13\) represented something of a concession by Strasbourg to the UKSC. It was decided by the GC that the sole and decisive test was not determinative of fairness – effective “counterbalances” could ensure a fair trial. Simplistically,

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\(^7\) s 259(1).
\(^8\) See N v HM Advocate 2003 JC 140.
\(^10\) Building on Luca v Italy (2003) 36 EHRR 46.
\(^12\) [2009] UKSC 14.
\(^13\) (2012) 54 EHRR 23.
then, the UKSC won this particular argument. The English Court of Appeal (CA) has certainly made clear its intention to follow the decision in *Horncastle*, even if there are occasional differences in emphasis between the UKSC’s judgment and the GC’s decision in *Al-Khawaja*.

The following paragraph of the GC’s judgment in *Al-Khawaja* should nevertheless be borne in mind:

> The Court... concludes that, where a hearsay statement is the sole or decisive evidence against a defendant, its admission as evidence will not automatically result in a breach of Art. 6(1). At the same time where a conviction is based solely or decisively on the evidence of absent witnesses, the Court must subject the proceedings to the most searching scrutiny. Because of the dangers of the admission of such evidence, it would constitute a very important factor to balance in the scales... and one which would require sufficient counterbalancing factors, including the existence of strong procedural safeguards. The question in each case is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place. This would permit a conviction to be based on such evidence only if it is sufficiently reliable given its importance in the case.

The first question thus remains whether hearsay evidence is the “sole or decisive” evidence against the defendant. If it is, then the question becomes whether sufficient “counterbalancing factors”, *including* “strong procedural safeguards”, existed and were applied properly to ensure that there was a fair trial. The paragraphs below explain what appear to be the relevant “counterbalancing factors” in England and Wales, based on the GC’s judgment. The corresponding Scottish position will be outlined after each measure, to demonstrate where reform of Scots law might be required, simply to bring it up to English standards (bearing in mind that these might not be sufficient to ensure ECHR compatibility):

1. The need to justify, or show “good reason” for, the absence of the witness. In English law, hearsay evidence is *prima facie* inadmissible. Assuming that the parties to proceedings do not all agree to the admission of the hearsay statement, a relevant statutory or common law exception to the hearsay rule must be identified, or it must be demonstrated to be in the “interests of justice” to admit the evidence. These “gateways” to admissibility demonstrate the circumstances in which it is justified to admit hearsay evidence.

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14 See *Ibrahim* [2012] EWCA Crim 837 at paras 87-89 per Aikens LJ; *Riat* [2012] EWCA Crim 1509 at para 2 per Hughes LJ. Cases since *Riat* have simply followed it, rather than sought to develop it – see e.g. *Friel* [2012] EWCA Crim 2871, at para 25 per Gross LJ (“In our judgment, what this field least requires unless necessary for the decision in the case is a yet further extended discussion of authority.”)
16 *Ibrahim* at para 85 per Aikens LJ.
17 Ibid.
18 *Al-Khawaja and Tahery* at para 148. See also *Lawrence* [2013] EWCA Crim 708 (insufficient steps taken to get witness to court).
19 For the definition of hearsay, see CJA 2003 ss 114-115.
20 CJA 2003 s 114(1)(a).
21 CJA 2003 s 114(1)(b).
22 CJA 2003 s 114(1)(c).
23 CJA 2003 s 114(1)(d).
Scots law adopts a similar inadmissibility-with-exceptions model with regard to hearsay evidence. The starting point is that hearsay evidence is inadmissible, and the primary exceptions to this rule are laid out in section 259(2) of the Criminal Procedure (Scotland) Act 1995. Three general preconditions must be satisfied in all cases: (i) first, it must be found that direct oral evidence on the matter in the statement would have been admissible at trial; (ii) secondly, it must be found that the statement maker was competent at the relevant time; and (iii) thirdly it must be possible for a properly directed jury (or trial judge, in summary cases) to find that the statement was made, and that it is either contained in a document, or spoken to by a witness with personal knowledge of its making.

In addition to the three conditions mentioned in the previous paragraph, before hearsay evidence can be admitted, it must also be shown that the statement maker: (a) “is dead or is, by reason of his bodily or mental condition, unfit or unable to give evidence in any competent manner” (conditions also found in English law); (b) “is named and otherwise sufficiently identified, but is outwith the United Kingdom and it is not reasonably practicable to secure his attendance at the trial or to obtain his evidence in any other competent manner” (ditto); (c) “is named and otherwise sufficiently identified, but cannot be found and all reasonable steps which, in the circumstances, could have been taken to find him have been so taken” (ditto); (d) “having been authorised to do so by virtue of a ruling of the court in the proceedings that he is entitled to refuse to give evidence in connection with the subject matter of the statement of the grounds that such evidence might incriminate him, refuses to give such evidence” (not provided for expressly in England and Wales, but presumably such evidence could be admitted if it is in the “interests of justice” to do so); or (e) “is called as a witness and either... refuses to take the oath or affirmation; or... having been sworn as a witness and directed by the judge to give evidence in connection with the subject matter of the statement refuses to do so” (a condition also found in English law). In sum, Scots law does not appear to be more permissive than English law in admitting hearsay evidence. Indeed, Scots law is narrower: it does not have the equivalent of English law’s exception for the statements of witnesses absent through fear (see, further, below), or a general power to admit hearsay evidence in the “interests of justice”.

(2) The prohibition on the admission of anonymous hearsay. As seen in the previous paragraph, some (but not all) Scots exceptions to the hearsay rule require the identification of the statement maker. This is largely the position in England and Wales, but there might be

25 CPSA 1995 s 259(1)(b).
27 CPSA 1995 s259(1)(d).
28 CJA 2003 ss 116(2)(a) (dead) and 116(2)(b) (unfit).
29 CJA 2003 ss 116(2)(c).
30 CJA 2003 ss 116(2)(d).
31 See Spencer, Hearsay Evidence in Criminal Proceedings (n 11) paras 6.42-6.44.
32 Special rules apply to children.
33 See e.g. Criminal Procedure Act 1865 ss 3-5.
34 CJA 2003 s 114(1)(d).
35 Al-Khawaja and Tahery at para 148.
exceptions to it. The GC does not appear to have grasped this point in Al-Khawaja. If, post-corroboration, a Scottish court were to premise a conviction “solely and decisively” on anonymous hearsay evidence, then this might well breach article 6. One way to ensure compliance would be to enact an express statutory provision preventing such a conviction from being returned.

(3) The requirement, in cases where a witness is absent from trial through fear, that admissibility be in the “interests of justice”, and that special measures such as screens, video-links, etc. be considered as an alternative to adducing hearsay evidence. This counterbalance is less relevant to Scotland, which does not have an exception to the hearsay rule based on the statement maker’s fear. The fear exception has been controversial in England and Wales, and it would be sensible for Scots law to avoid creating a similar rule.

(4) The potential to admit evidence relevant to the statement maker’s credibility/consistency and capacity, even (with leave) if such evidence would not be admissible if the statement maker were to give evidence at trial, in order to make a “fair and proper assessment” of the reliability of the evidence. Scots law provides for similar evidence to be admitted, so no change is required in that respect.

(5) The power to exclude hearsay evidence if it is insufficiently probative, and/or its consideration would be an undue waste of time. Scottish judges could, it is assumed, deem such evidence insufficiently relevant to be admissible. There is thus no clear need to amend Scots law’s hearsay provisions in this manner.

(6) The trial judge’s power to stop a case based “wholly or partly” on hearsay evidence that is so unconvincing that any conviction would be unsafe. As is explained elsewhere in this report, a Scottish trial judge’s power to prevent a case from proceeding to the jury is currently

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36 Various of the statutory exceptions to the hearsay rule require the source of the hearsay evidence to be identified – see e.g. CJA 2003 ss 116(1)(1)(b), 117(2). Furthermore, anonymous hearsay cannot be admitted in the “interests of justice” – see CJA 2003 s 114(1)(d); Ford [2010] EWCA Crim 2250. It is not clear, however, whether the common law exceptions to the hearsay rule (preserved by CJA 2003 s118) would be subject to the same restriction. For instance, res gestae statements might well be anonymous, yet even these pieces of evidence were clearly admissible at common law: Teper v R [1952] AC 480 (witness allowed to testify to what another (anonymous) person had shouted after defendant). See also Ormerod’s commentary on Ford, at [2011] Crim LR 477; J R Spencer, “Hearsay evidence at Strasbourg: a further skirmish or the final round?” [2012] 1 Arch Rev 5 at 7-8.


38 See Spencer, Hearsay Evidence in Criminal Proceedings (n 11) paras 6.27-6.41.

39 On capability to make a statement, see CJA 2003 s 123.

40 Al-Khawaja and Tahery at para 149. See CJA 2003 s 124. The importance of this section was emphasised in Riat [2012] EWCA Crim 1509 at para 18 per Hughes LJ.

41 Ibrahim [2013] EWCA Crim 708 at para 85 per Aikens LJ.

42 CPSA 1995 s 259(4).

43 Al-Khawaja and Tahery at para 149. See CJA 2003 s 126(1). This exclusionary power applies to all hearsay evidence, whether presented by the prosecution or the defence: Riat at para 21 per Hughes LJ. It is thus wider than the powers preserved under s 126(2) (see below), which apply only to prosecution evidence.

44 This is hinted at in N v HM Advocate 2003 JC 140 at para 23 per Lord Justice-Clerk Gill.

45 CJA 2003 s 125. An “unsafe” conviction is broadly similar to a Scottish “miscarriage of justice”. See Criminal Appeal Act 1968 s 2.
limited.\textsuperscript{46} It is not clear if this difference would render the Scottish hearsay rules at risk of ECHR non-compatibility, but – given that it might be – this adds weight to the argument for a more liberal power to uphold a “no case to answer” submission.

(7) The general discretion to exclude evidence where its admission would impact adversely on the fairness of proceedings.\textsuperscript{47} The relevant English exclusionary power includes legally obtained evidence to be tendered by the prosecution (the admission of which might impact adversely on the fairness of proceedings), but is less likely to be applied in such cases. It would appear that, under Scots law, if one of the statutory exceptions to the hearsay rule applies, the trial judge does not have a general discretion to exclude the evidence.\textsuperscript{48}

There is, however, the possibility that a Scots accused could raise an argument that the admission of the evidence would be inconsistent with the right under art 6(3)(d). The trial court could then exclude the evidence on the basis that the trial would be unfair if it was admitted.

(8) The common law rule that the jury will be directed about the dangers of relying on a hearsay statement.\textsuperscript{49} A Scots trial judge must deliver such a direction.\textsuperscript{50} Some model directions are included in the \textit{Jury Manual}.\textsuperscript{51}

The result of the GC’s decision in \textit{Al-Khawaja} is that, if the protections mentioned in the preceding paragraphs are applied properly, then “in principle” the trial will have been fair.\textsuperscript{52} The CA has, in the light of this point, begun to allow appeals against conviction where the “counterbalancing measures” above were not applied thoroughly enough.\textsuperscript{53}

The various considerations listed above ensure that attention is focussed to the dangers attendant upon admitting hearsay evidence, and that such evidence is not simply “nodded through” into the trial.\textsuperscript{54} One thing the “counterbalances” do not amount to, as far as the English jurisprudence is concerned, is a requirement of \textit{corroboration} in cases where hearsay is “the central piece of evidence without which the case could not proceed”.\textsuperscript{55}

\begin{itemize}
\item \textsuperscript{46} See ch 11.
\item \textsuperscript{47} \textit{Al-Khawaja and Tahery} at para 150. This exclusionary power (found in the Police and Criminal Evidence Act 1984, s 78) is preserved in relation to hearsay evidence by the CJA 2003 s 126(2)(a). Other common law discretions to exclude evidence (e.g. where evidence is more prejudicial than probative: \textit{Sang} [1980] AC 402) are retained by s 126(2)(b).
\item \textsuperscript{48} \textit{N v HM Advocate} 2003 JC 140 at paras 22-23 per Lord Justice-Clerk Gill. See also G H Gordon, \textit{Renton and Brown: Criminal Procedure according to the Law of Scotland}, 6\textsuperscript{th} edn (1996) para 24.130.
\item \textsuperscript{49} \textit{Al-Khawaja and Tahery} at para 150. For an example of an “unimpeachable... clear, lucid and accurate” direction, see \textit{Claridge} [2013] EWCA Crim 203 at para 18.
\item \textsuperscript{50} On the requirements of such a direction, see \textit{Higgins v HM Advocate} 1993 SCCR 542 at 552-553 per Lord Justice-Clerk Ross.
\item \textsuperscript{51} For references, see Judicial Institute, \textit{Jury Manual – Some Notes for the Guidance of the Judiciary} (January 2014) ch 15.
\item \textsuperscript{52} \textit{Al-Khawaja and Tahery} at para 151.
\item \textsuperscript{53} See e.g. \textit{Ibrahim; Shabir} [2012] EWCA Crim 2564; \textit{Tahery} [2013] EWCA Crim 1053 (in the light of the fact that the GC found a breach of art 6(1), the quashing of the conviction was perhaps a \textit{fait accompli}).
\item \textsuperscript{54} \textit{Riat} at para 25 per Hughes LJ; \textit{Friel} [2012] EWCA Crim 2871 at para 29 per Gross LJ.
\item \textsuperscript{55} This rebranding of the “sole and decisive” test occurred in \textit{Ibrahim} at para 78 per Aikens LJ. The language is taken from \textit{Spencer} (n 36) at 7. On the absence of a need for corroboration, see \textit{Ibrahim} at paras 106 and 109 per Aikens LJ; \textit{Riat} at paras 4-5 per Hughes LJ.
\end{itemize}
The CA has held that, rather than resorting to a requirement of corroboration that does not appear on the face of the CJA 2003, trial judges should concentrate on two matters. First, whether the hearsay evidence appears to be reliable, and secondly the extent to which the defendant can combat the hearsay evidence and present her defence. On the reliability front, the following factors have been recognised as important by the courts: (1) the proper recording of the statement; (2) the circumstances in which the statement was made (e.g. was it spontaneous?); (3) any motivation/opportunity to lie on the part of the statement maker; (4) the existence of independent supportive evidence/evidence with which the statement can be tested; (5) other evidence in the case consistent with guilt; (6) bad character evidence relating to the defendant; (7) the existence of evidence to test the credibility of the statement maker; and (8) the presence of other witnesses, who will make similar statements at trial and can be cross-examined. It should be noted, again, that corroborative evidence does not appear to be necessary from Al-Khawaja and the subsequent English cases, though it might help bolster the reliability of a piece of hearsay evidence. Nothing stops Scottish courts from considering the factors mentioned in this paragraph, to ensure that a piece of hearsay evidence does not endanger the fairness of the accused’s trial.

In cases where there is absolutely no corroborative evidence, the trial might still – on the English reading of article 6 – be fair, provided that other “counterbalancing measures” are in place, and used properly. The difficulty is that the ECtHR does not necessarily share the same view about corroboration.

8.3 An alternative, problematic view

As Jackson and Summers have noted, the Strasbourg Court has focussed almost exclusively on corroborative evidence (and strong corroborative evidence at that) when deciding, post-Al-Khawaja, whether an out-of-court statement can be the “sole and decisive” evidence against an accused person. (Indeed, the finding that Al-Khawaja had a fair trial, but Tahery did not, is explicable largely on the basis that there was corroborative evidence in the former but not in the latter.) They report that “[i]there is little evidence in the judgments of the ECtHR of any counterbalancing factors, other than simply the existence of other corroborative evidence”. If it is correct that the ECtHR does

56 Riat at paras 5-6 per Hughes LJ.
57 Al-Khawaja and Tahery at para 156.
58 Riat at para 6 per Hughes LJ.
59 See e.g. Harvey [2014] EWCA Crim 54; Adejojo [2013] EWCA Crim 41.
60 Riat at para 36 per Hughes LJ; Al-Khawaja and Tahery at para 131. The trial judge is not to look for “independent complete verification” before admitting a piece of hearsay evidence: Jabbar [2013] EWCA Crim 801 at para 31 per Treacy LJ.
61 Friel [2012] EWCA Crim 2871.
62 Riat at para 42 per Hughes LJ.
63 Al-Khawaja and Tahery at para 157.
64 J Jackson and S Summers, “Confrontation with Strasbourg: UK and Swiss approaches to criminal evidence” [2013] Crim LR 114 at 123-125. See further Hümmers v Germany, App No 26171/07, 19/10/2012 (breach of art 6 due to insufficient corroborative evidence); Vidgen v Netherlands, App No 29353/06, 10/07/2012 (ditto); Trampesvski v FYR of Macedonia, App No 4570/07, 10/10/12 (insufficient evidence with which to test hearsay statements – capacity to give evidence on own behalf insufficient “counterbalancing measure”); Fafrowicz v Poland, App No 43609/07, 17/04/12 (“ample” corroborative evidence of guilt, no art 6 breach).
66 Jackson and Summers (n 64) at 124. See also ch 17.
require corroborative evidence (of the offence being committed by the accused) in cases involving hearsay, then the “sole and decisive” test might make a reappearance at some stage in the future. The general abolition of Scots law’s corroboration requirement would then be problematic.\footnote{Consideration of cases where \textit{all} evidence, even if from various sources, is hearsay, or there is “multiple” hearsay (X was told what Y said by Z) is excluded from discussion here as this is not an issue that arises from the removal of the requirement for corroboration. On multiple hearsay in English law, see CJA 2003 s 121.}

\textbf{8.4 Conclusion}

Other chapters of this report assume that the removal of a general requirement of corroboration would be compatible with the ECHR. If it is not, then most Member States are in breach of their treaty obligations, because they have no such general rule. With the law on hearsay, however, there is a danger of Scots law becoming non-compliant, if hearsay evidence is permitted to be the “sole and decisive” evidence against an accused person. One solution would be to retain a supporting evidence requirement in relation to hearsay evidence.\footnote{Something that is also suggested for consideration in relation to confession evidence in ch 6.} Another solution would be to abolish the requirement of corroboration in relation to hearsay evidence, and add the English “counterbalancing measures” discussed above, where these are absent from Scots law, or where their availability north of the border is unclear. This would ensure compliance with the UKSC/CA’s view of what article 6(3)(d) requires. It must be borne in mind, however, that the ECtHR might still disagree and, as such, this is not the option preferred here.

\textbf{8.5 Issue for consideration}

It is suggested that the Review should consider whether a statutory supporting evidence requirement should be introduced for cases where the “sole and decisive” evidence against the accused is hearsay.

It will be noted that previous chapters have raised the question of whether Scottish judges should have a general power, analogous to that in England under section 78(1) of the Police and Criminal Evidence Act 1984, to exclude evidence where its admission would impact adversely on the fairness of proceedings. Such a power would be equally applicable to hearsay as to other categories of evidence.
CHAPTER 9: JURY DIRECTIONS

Fiona Leverick

9.1 Introduction

It has been suggested that certain types of evidence might pose a risk of wrongful conviction, especially in the absence of a corroboration requirement – most notably eyewitness identification evidence, confession evidence and the evidence of accomplices and informers.\(^1\) It has been proposed in previous chapters\(^2\) that one way of countering this would be to warn jurors of the risks these types of evidence pose by way of a jury direction.\(^3\) This chapter discusses the effectiveness of jury directions as a safeguard against the risk of wrongful conviction with reference to the relevant experimental research. It focuses primarily on eyewitness identification evidence, as this is where the vast majority of research has been done.

9.2 The experimental evidence on the effectiveness of jury directions

It has sometimes been suggested that jury directions on the reliability of witness testimony are either ineffective or undesirable and, in particular, might have the opposite effect on the jury to the one intended by drawing attention to the most damning parts of the prosecution case.\(^4\) Roach notes that jury warnings place “enormous faith in the ability of juries to follow such instructions, despite the fact that social science and common sense suggest that warnings may not always have their desired effect”.\(^5\) In a review of the available evidence undertaken in 1995, Cutler and Penrod stated that “we are forced to conclude that the judges’ instructions do not serve as an effective safeguard against mistaken identifications and convictions”.\(^6\) This section assesses these claims in light of the available experimental evidence and concludes that, contrary to Cutler and Penrod, there is reason for cautious optimism about their effectiveness.

A cautionary note about research methods

Before embarking on a survey of the research, it is necessary to say something about the methods typically used in the studies, the vast majority of which involve mock juries. Mock jury studies do have a number of limitations that might affect their “external validity”: the extent to which their findings are generalisable beyond the experimental setting.\(^7\) Most notably, these relate to...

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1. See ch 4.
2. See ch 5 (eyewitness identification evidence); ch 6 (confession evidence); ch 7 (Evidence of accomplices and informers).
3. Another possibility would be to do so by letting the jury hear expert evidence on the subject and this is discussed later in this chapter.
7. The classic exposition of these is W Weiten and S S Diamond, “A critical review of the jury simulation paradigm: the case of defendant characteristics” (1979) 3 Law and Human Behavior 71. For an overview of the methodological issues, see also S S Diamond, “Illuminations and shadows from jury simulations” (1997) 21 Law...
inadequate sampling (especially the use of university students as ‘jurors’); inadequate trial simulation (such as a reliance on a transcript or study pack rather than a video or trial re-enactment), an absence of jury deliberation in the research design; the use of inappropriate dependent variables (such as asking jurors to rate the probability of guilt on a scale); and participants’ awareness that they are role playing and that their decision has no real life consequences.

The extent to which each of these affects generalisability is contested by psychologists. In a meta-analysis that is unfailingly cited by those using these research methods, Bornstein has argued that the use of student jurors and/or trial transcripts makes very little difference to research results. Others have questioned his conclusions, suggesting that this depends on the issue being researched.

There is a broader consensus over the lack of deliberation. As Shaffer and Wheatman put it, “perhaps the greatest limitation of mock-trial simulations is that the vast majority of them attempt to draw inferences from decisions rendered by nondeliberating mock jurors rather than deliberating mock juries” and the researchers go on to discuss some of the reasons why this might be the case. The deliberation process, they suggest, potentially irons out misunderstandings that might be held by individual jurors and jurors who hold prejudices (or who are disinclined to follow instructions) might not act this way in a group situation where they have to articulate their reasoning to others. There is also a vast body of social psychological literature indicating that group decisions differ from individual decisions and research with real jurors has shown that deliberation does affect the verdict reached in a small but significant proportion of cases.

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8 Discussed by Weiten and Diamond (n 7) at 75.
9 At 77.
10 At 78.
11 At 79.
12 At 81.
13 See e.g. H M Paterson, D W M Anderson and R I Kemp, “Cautioning jurors regarding co-witness discussion: the impact of judicial warnings” (2013) 3 Psychology, Crime and Law 287 at 301.
16 See e.g. D J Devine and others, “Jury decision making: 45 years of empirical research on deliberating groups” (2001) 7 Psychology, Public Policy and Law 622 at 625; N Nuñez, S M McCrea and S E Culhane, “Jury decision making research: are researchers focusing on the mouse and not the elephant in the room?” (2011) 29 Behavioral Sciences and the Law 439 at 443.
18 At 657-658.
19 This is summarised by Nuñez, McCrea and Culhane (n 16) at 443-446.
20 H Kalven and H Zeisel, The American Jury (1966), who found that the verdict preferred by the majority of jurors on the first ballot was not the eventual verdict in ten per cent of cases. See similarly M Sandys and R C Dillehay, “First-ballot votes, predeliberation dispositions, and final verdicts in jury trials” (1995) 19 Law and Human Behavior 175.
A detailed discussion of methodological concerns lies beyond the scope of this report. It is, however, important that lawyers are aware of the issues. When lawyers look to psychological studies there is a danger that they either dismiss them out of hand as having no possible relevance in the legal context or that they accept their findings uncritically. Some studies are more “realistic” in terms of the research methods they use than others and thus what is required is a more nuanced position whereby there is an awareness of the research methods used by a particular study and the possible limitations of these before reliance is placed on it for policy formation purposes.

The jury direction studies

This section summarises the findings of the relevant studies. In terms of the types of warning noted above, it is only jury directions relating to eyewitness identification evidence that have received any significant research attention. As such this section will focus primarily on eyewitness identification, but many of the points made have more general application.

Even in relation to eyewitness identification, the number of experimental studies that have examined the effectiveness of jury directions is vastly outweighed by those that have examined the effectiveness of expert evidence, as indicated by the fact that there exist several meta-analyses of the latter but none of the former. This may stem from the fact that the majority of the research has been undertaken by US based researchers, where the use of expert evidence is more extensive than it is in the UK jurisdictions. Some assistance might nonetheless be drawn from the expert evidence studies, as will be shown later.

A search of legal and psychological databases identified five studies in peer reviewed journals that have assessed the effectiveness of jury directions on eyewitness identification evidence. Any evaluation of these studies needs to keep in mind that the desired result of a jury direction on eyewitness identification evidence is to induce what has been termed “juror sensitivity” and not “juror scepticism”, the latter being a general mistrust of eyewitness identification evidence even when this is not merited. As such, any experimental design that does not vary the strength of the eyewitness identification is unlikely to yield any useful results. The usefulness of the study is also dependent on the quality of the jury direction utilised – if the direction is difficult to comprehend and/or inaccurate then this does not necessarily mean that all jury directions will be ineffective. In this context, it is worth noting that the Telfaire direction that is used by a number of the studies

21 It has been suggested that relatively “realistic” research methods (such as videotaped trials and the use of jurors from the general population rather than students) have become less common over time: see Bornstein (n 14) at 87.
23 For an overview of the studies, see Cutler and Penrod (n 6) ch 17; L D Dufrainmont, “Regulating unreliable evidence: can evidence rules guide juries and prevent wrongful convictions?” (2008) 33 Queen’s LJ 261 at 301-309.
24 Martire and Kemp (n 22) at 25.
25 At 26.
26 Ibid.
27 United States v Telfaire, 469 F.2d 552 (DC Cir 1972). The direction states (at paras 20-29) that: “In appraising the identification testimony of a witness, you should consider the following:
has been extensively criticized on the basis that while it lists factors that can contribute to mis-
identification, it is vague as to their relevance and does not explain the way in which these can affect
accuracy. Finally, it is worth repeating the point that studies vary in the extent to which the
experimental design replicated the real life trial setting and studies that do not include an element
of jury deliberation must be regarded with particular caution.

The earliest study is that of Katzev and Wishart, who found that giving mock jurors a Telfaire
direction after asking them to watch a 40 minute mock burglary trial resulted in a significant
increase in not guilty verdicts pre-deliberation. Post-deliberation, the number of not guilty verdicts
also increased slightly. However, given the numerous flaws in the experimental design (it used
student subjects, there was no variation of the strength of the identification evidence and the
overall evidence against the accused was very weak), little can be usefully taken from the findings.

The next significant study was carried out by Cutler, Dexter and Penrod, in which undergraduate
student jurors were given a Telfaire direction after a videotaped mock trial in which a witness
identified the accused as the perpetrator. They found some evidence of increased juror sensitivity
(as measured by the proportion of guilty verdicts returned) from hearing the direction, although the
effect was small and not significant. However the experiment did not involve deliberation and

1. Are you convinced that the witness had the capacity and an adequate opportunity to observe the offender?
2. Are you satisfied that the identification made by the witness subsequent to the offense was the product of
   his own recollection? You may take into account both the strength of the identification and the circumstances
   under which the identification was made.
3. Finally, you must consider the credibility of each identification witness in the same way as any other
   witness, consider whether the witness is truthful, and consider whether the witness had the capacity and
   opportunity to make a reliable observation of the matter covered in his testimony.

I again emphasize that the burden of proof on the prosecutor extends to every element of the crime charged,
and this specifically includes the burden of proving beyond a reasonable doubt the identity of the defendant as
the perpetrator of the crime with which the defendant stands charged. If after examining the testimony, you
have a reasonable doubt as to the accuracy of the identification, you must find the defendant not guilty.”

28 See e.g. Dufrainmont (n 23) at 306; C Sheehan, ”Making the jurors the experts: the case for eyewitness
identification jury instructions” (2011) 52 Boston College LR 651 at 680.
29 The use of the term “significance” here (and in the remainder of this discussion) refers to statistical
significance – the likelihood that the results were due to a genuine causal relationship rather than chance.
30 R D Katzev and S S Wishart, “The impact of judicial commentary concerning eyewitness identifications on
jury decision making” (1985) 76 J of Crim Law and Criminology 733 at 739.
31 At 740. It should be noted that table 1 of their paper (at 739) erroneously omits the word “not” from “not
guilty” and is therefore not a correct representation of Katzev and Wishart’s results.
32 As evidenced by the fact that post-deliberation 27 of the 30 juries returned not guilty verdicts (at 740).
33 B L Cutler, H R Dexter and S D Penrod, “Nonadversarial methods for improving juror sensitivity to eyewitness
34 Cutler, Dexter and Penrod also compared the effectiveness of jury directions to that of testimony from a
court appointed expert and their findings in this respect are discussed below.
35 Cutler, Dexter and Penrod (n 33) at 1202.
Cutler, Dexter and Penrod themselves acknowledge that the poor quality of the *Telfaire* direction may have been to blame for inducing scepticism in some participants.\(^{36}\)

A further study was undertaken by Ramirez, Zemba and Geiselman,\(^{37}\) who conducted two separate experiments. The first used similar methods to Cutler, Dexter and Penrod and found that the *Telfaire* direction caused a significant scepticism effect – jurors hearing the direction were less likely to convict in both the “good” and the “poor” identification conditions.\(^{38}\) The second compared the effectiveness of the *Telfaire* instruction with a re-written instruction in which the language was simplified and the content revised to reflect more accurately the relevant experimental research. They found that there was little difference between the effectiveness of the *Telfaire* direction and their re-written direction in terms of the proportion of guilty verdicts returned. However, this finding must be regarded with caution. Like Cutler, Dexter and Penrod, their experiment did not involve deliberation and the evidence against the accused was very weak overall, suggesting that scepticism might, in fact, have been the most appropriate attitude in both the “good” and “poor” identification conditions. It is also worth noting that the revised instruction did result in a significant improvement in recall of the direction’s content and a “modest” increase in juror knowledge about the relevant issues.\(^{39}\)

An improvement in the realism of the experimental conditions can be found in the two experiments undertaken by Greene.\(^{40}\) Her first experiment involved a videotaped assault trial that was shown to undergraduate student “jurors” in which a person was accused of throwing a bottle that hit and blinded the complainer. One of the bar staff gave evidence identifying the accused as the perpetrator. The strength of the identification evidence was varied (in the “strong” version she had an unobstructed view and the bar was well lit; in the “weak” version the bar was dimly lit and her view was partially obstructed). The jurors were given a *Telfaire* direction and were allowed 30 minutes of deliberation before reaching a “verdict”.\(^{41}\) In the second experiment, the conditions were identical, save for the fact that she, like Ramirez, Zemba and Geiselman, used a revised instruction, rewritten to make it linguistically more comprehensible and to reflect more accurately the findings of relevant psychological research,\(^{42}\) and a shadow jury\(^{43}\) was used rather than student subjects. She found that the *Telfaire* direction caused a significant scepticism effect – the conviction rate decreased from 42 per cent to 6.5 per cent even for the strong identification evidence.\(^{44}\) It had no effect when the weak identification evidence was used, where the conviction rate was three per cent regardless of whether the jury had been given the instruction, but, as Cutler and Penrod point out,\(^{45}\) this was probably because the weak evidence was so weak that a jury was never going to convict. In her second experiment, the revised instruction also induced scepticism rather than

\(^{36}\) At 1205.


\(^{38}\) At 41.

\(^{39}\) At 56.


\(^{41}\) At 256.

\(^{42}\) Her revised instruction is reproduced at 263-264.

\(^{43}\) Real life jurors who had been summoned to court but not ultimately selected for trial.

\(^{44}\) Greene (n 40) at 258.

\(^{45}\) Cutler and Penrod (n 6) at 260.
sensitivity. It resulted in a higher proportion of acquittals in the weak identification evidence condition (73 per cent compared to 42 per cent where no instruction was given and 41 per cent where a Telfaire instruction was given). However, it also resulted in a higher proportion of acquittals in the strong identification evidence condition (75 per cent, compared to 22 per cent for no instruction and 35 per cent for the Telfaire instruction).46

Greene’s second experiment is without doubt the study that has used the most realistic experimental conditions, and it used a comprehensible and accurate jury direction, and yet this still induced scepticism rather than sensitivity. This might imply that jury directions on eyewitness identification evidence are of limited usefulness. However, her research design still had important limitations. It was a single experiment involving only 139 jurors where deliberation was limited to 30 minutes, after which jurors were asked to vote individually (rather than reach a collective decision). Most problematically, the eyewitness evidence, even in the “strong” version of the experiment, was weak – when asked if the accused was the person who threw the bottle, the eyewitness in her testimony said only that the accused “might have done so”.47 As such, scepticism was probably entirely appropriate. It is worth noting that Greene’s rewritten eyewitness evidence instruction was extremely effective in improving juror understanding of the factors affecting the accuracy of eyewitness identifications – jurors who were given the rewritten instruction scored significantly better on this than jurors who were given no instruction or the Telfaire instruction.48

Finally, a rather different research method was used in a study undertaken by Martire and Kemp.49 They used what they called a “real eyewitness design”50 where a first set of study participants acted as “witnesses” who were asked to view a video reconstruction of a robbery and then identify the perpetrator from a line-up. They then “gave evidence” and a second set of study participants acting as “jurors” were asked whether or not they believed them. This could then be compared to the true accuracy of the identifications. The jurors in the experiment were undergraduate psychology students and they were divided into six groups where the experimental conditions were varied so that they watched either a “correct” or a “mistaken” witness give evidence and they received either a jury instruction,51 a video of expert evidence on eyewitness identification, or no assistance at all. The researchers found that jurors were correct in their assessments 63.6 per cent of the time but that there was no significant difference between the jury direction group, the expert evidence group and the control group: “the objective accuracy of the judgments they made were not found to be significantly associated with the type of instruction they heard”.52

But quite what can be gleaned from this study is difficult to assess. The number of mock jurors who witnessed each of the six possible scenarios was relatively small and the study design did not include any element of deliberation. In addition, the “witnesses” watched a video reconstruction rather than experiencing a real life event where environmental conditions and stress would most likely have played a part in the accuracy of their identification. Most importantly, the conditions in which the

46 Greene (n 40) at 266.
47 At 256, emphasis added.
48 At 259 (no instruction and Telfaire instruction) and 267 (rewritten instruction).
50 At 226.
51 Taken from the Judicial Commission of New South Wales Benchbook.
52 At 232.

witnesses saw the perpetrator were not varied and therefore the only variables the jurors had to go on in determining accuracy were the witnesses’ reported confidence levels and their demeanour at trial. As such the usefulness of the findings is limited.

Thus far there is, at best, only limited support to be found in the experimental studies for the effectiveness of jury directions on eyewitness identification evidence. A slightly more optimistic note might be sounded by a study undertaken by Paterson, Anderson and Kemp. The researchers examined the impact of a jury direction on the effect of post-event discussion among witnesses in a dangerous driving case. Mock jurors were given a trial transcript (of a dangerous driving trial) where eyewitness evidence was given by two witnesses. One gave evidence to the effect that she had seen the accused using a mobile phone. She did not mention this to the police at the time, but told them about it later after she had spoken to another witness to the event. The other witness mentioned the mobile phone in both her initial statement and in a later interview. Half of the participants were given a jury direction that mentioned the dangers associated with witness contamination. The others were either given no direction whatsoever on eyewitness evidence or were given a general direction. Here, the specific warning did not induce general scepticism but resulted in a marked sensitivity effect – there was a significant reduction in belief of the testimony of the inconsistent witness when the specific warning was given, compared to the no warning condition and the general warning condition. Such a reduction did not occur in relation to the consistent witness. This did not translate into a change in beliefs about the guilt or innocence of the accused but, as the researchers suggest, this could be for any multitude of reasons, including the strength of the rest of the evidence in the case. That said, the findings must be still regarded with some caution. This was not the most realistic of experiments – the mock jurors were 80 undergraduate students, it involved a transcript rather than a video reconstruction and there was no deliberation.

To summarise, the most common finding of the experimental research on eyewitness identification evidence is that jury directions appear to lead to an increase in general scepticism about such evidence, rather than a more desirable sensitivity effect. Clear evidence of the latter was found in only one study, that of Paterson, Anderson and Kemp, which examined eyewitness evidence in the context of cross-contamination rather than identification and where the experimental conditions were less than ideal. Some support for a sensitivity effect was found by Cutler, Dexter and Penrod, but their results were not statistically significant.

It would, however, be premature to conclude from this that jury directions cannot work. The studies are, as Dufraimont states, “few in number, are plagued with methodological problems and focus predominantly on the Telfaire instruction, which lacks the kind of informational content necessary to educate jurors about the frailties of eyewitness identification”. The two studies that evaluated the effect of a revised direction (Greene’s experiment 2, Ramire, Zemba and Geiselman’s experiment 2) were, frustratingly, both hampered by the fact that the evidence against the accused was weak overall. Thus, while both reported a scepticism effect, this may well have been the appropriate attitude. It is worth reiterating that both studies found that their rewritten directions improved juror comprehension of the relevant issues, compared to no direction at all, or the Telfaire direction.

54 At 299.
55 At 300.
56 Dufraimont (n 23) at 306.
The expert evidence studies

Given the rather limited number of studies of jury directions on eyewitness identification, the question arises of whether any assistance might be gained from the larger body of experimental research that has evaluated the impact of eyewitness expert testimony on jury decision making. Martire and Kemp’s meta-analysis identified 24 experiments of this nature,\(^{57}\) some of which found that expert evidence induced a general scepticism effect but some of which found that it improved juror sensitivity.\(^{58}\) This might be seen as a cause for optimism, as the fact that expert evidence is capable of inducing sensitivity (albeit in experimental conditions with all the generalisability caveats that this implies) suggests that appropriate jury directions might do likewise. This especially as many of the expert evidence experiments used “court appointed experts” who were not cross-examined and thus the input provided to jurors was not dissimilar to that of a judicial direction.\(^{59}\)

It does, however, raise the question of whether allowing an expert to testify on the risks of eyewitness identification (or false confessions) might be more effective than a judicial direction, as has sometimes been suggested.\(^{60}\)

There are a number of arguments that might be made in favour of expert evidence over jury directions. Jurors might be more willing to accept the word of an “expert” than a trial judge. They might also be more inclined to remember and follow the advice if it is given during the trial (close in time to when the witness testimony was given), in the form of questions and answers and is not buried within a long judicial direction that also includes instructions on other matters.

These arguments are, however, almost certainly outweighed by the arguments against. There is the obvious issue of cost. There is a risk of juror confusion, especially if cross-examination is particularly rigorous or if opposing experts give evidence on the same issue, and a risk that attention is diverted from more central issues in the trial. There is also the risk that prejudice may result from jurors giving inordinate weight to the testimony of an expert on the basis of factors other than the validity of their conclusions.\(^{61}\) Above all, however, it would seem unnecessary (except perhaps in the most exceptional of cases), given that the scientific findings on eyewitness identification are relatively settled and are not especially complex. A suitable model direction ought to be relatively easy to prepare (and relatively easily adapted by trial judges to the circumstances).

Support for this last point is borne out by the experiments that have directly compared the effectiveness of jury directions and expert testimony in the context of eyewitness identification evidence.\(^{62}\) Two studies have been reported (both of which were described above in the context of their findings on jury directions). Neither found any evidence that expert testimony was a superior method of inducing sensitivity,\(^{63}\) although as both studies suffered from methodological flaws\(^{64}\) this

\(^{57}\) Martire and Kemp (n 49) at 25. The findings of the studies are summarised in their paper in tabular form at 31.
\(^{58}\) At 31.
\(^{59}\) Leippe (n 22) at 934-939.
\(^{61}\) Sheehan (n 28) at 675.
\(^{62}\) Cutler, Dexter and Penrod (n 33); Martire and Kemp (n 49).
\(^{63}\) Cutler, Dexter and Penrod (n 33) at 1202; Martire and Kemp (n 49) at 231.
finding does have to be regarded with some caution. A comparison of expert evidence and jury
directions in a different context — that of child witness testimony in sexual abuse trials — also found
both to be equally effective in correcting misconceptions. As such it is suggested here that the case
for expert evidence on eyewitness identification is not made out.

The effectiveness of directions on confession and accomplice evidence

Finally, it is worth mentioning the very limited experimental research that exists in relation to
confession evidence. There does not appear to have been any peer reviewed research undertaken
into the effect of jury directions on confession evidence. Likewise, a search of relevant legal and
psychological databases did not reveal any experimental research on the impact of jury directions in
relation to accomplice evidence. One study that might be of significance is that undertaken by
Blandón-Gitlin and others, who examined the impact on mock jurors of expert testimony on the risk
of false confessions and found that it had a limited (“significant but modest”) effect on sensitising
jurors to the risk of false confessions, as measured by the proportion of jurors who returned guilty
verdicts. However, the external validity of the experiment was not high — the subjects were 147
college students, who worked from a study pack and did not deliberate.

A summary so far

The experimental studies on the effectiveness of jury directions on eyewitness testimony are
inconclusive. The limited number of studies that have been undertaken have mostly shown that jury
directions tend to result in increased scepticism towards all eyewitness identification evidence,
regardless of its strength. However, this conclusion has to be tempered by the fact that every single
study — even the most realistic — suffers from serious methodological problems. Support for the
effectiveness of jury directions can be drawn from the expert evidence studies, some of which have
been found to induce sensitivity, and from the one experiment that examined eyewitness testimony
and witness contamination. The sole study on confession evidence (which examined the effect of
expert testimony) was also successful in inducing sensitivity. Finally, there is some reason for
optimism in the fact that at least two studies have shown that a well-constructed direction can
improve juror appreciation of the factors affecting the reliability of eyewitness identification
evidence.

There are, in summary, grounds for cautious optimism (but no more than this) that jury directions on
eyewitness identification can work. Their effectiveness is, however, likely to depend on their content

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64 See the discussion of each above at text to nn 33-36 (Cutler, Dexter and Penrod) and nn 49-52 (Martire and
Kemp).

to counter misconceptions in child sexual abuse trials” (2011) 44 Australian and New Zealand Journal of
Criminology 196 at 208.

66 The only study of the impact of such evidence on jury decision making did not evaluate the usefulness of jury
directions: see J S Neuschatz and others, “The effects of accomplice witnesses and jailhouse informants on jury
decision making” (2008) 32 Law and Human Behavior 137.

67 I Blandón-Gitlin, K Sperry and R A Leo, “Jurors believe interrogation tactics are not likely to elicit false
confessions: will expert witness testimony inform them otherwise?” (2010) 1 Psychology, Crime and Law 1 at
15.

68 At 10.
and on the manner in which they are presented. As such, it is worth turning to the broader body of
research that has examined the factors that can improve the effectiveness of jury directions.

9.3 What can be done to improve the effectiveness of jury directions?

Three issues stand out from the literature: simplification of language, ensuring that the directions
accurately reflect the relevant considerations and providing a written copy to jurors. Each will be
examined in turn.

Simplification of language

If jury directions are to be effective, they need to convey information in a way that juries can
understand and utilise it. Over-complex jury directions are likely to be ineffective at best and
counter-productive at worst. A vast body of experimental research exists that has assessed the
extent to which juries comprehend the directions they are given by trial judges and, as Comiskey
puts it, these “have almost unanimously concluded that a jury’s ability to comprehend legal
instructions is poor and that there is room for considerable improvement”.

To give some examples, Haney and Lynch, in a study of death penalty instructions in California,
found that jurors were unable to apply them because they did not know what mitigating or
aggravating meant. Rose and Ogloff tested Canadian mock jurors’ comprehension of a direction on
conspiracy and concluded that it was “abysmally poor”. In research undertaken with 48 real life
criminal juries for the New Zealand Law Commission, Young, Cameron and Tinsley asked jurors
about the directions they had received (which included directions on the ingredients of the offence,
the meaning of intent and the meaning of beyond reasonable doubt). They concluded that:

... there were widespread misunderstandings about aspects of the law which persisted
through to, and significantly influenced, jury deliberations. Indeed, there were only 13 of the
48 trials in which fairly fundamental misunderstandings of the law at the deliberation stage
did not emerge.

Closer to home, Thomas was granted access to jurors in three English Crown Courts who had not
been selected to sit on a trial. They observed a simulated trial and heard legal directions from a
practising trial judge. In one court, jurors were tested on their understanding of an instruction they

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69 Dufraimont (n 23) at 297; Sheehan (n 28) at 687; Queensland Law Reform Commission (n 4) para 5.77.
71 For a summary see e.g. V G Rose and J R Ogloff, “The comprehension of judicial instructions”, in N Brewer
72 M Comiskey, “Initiating dialogue about jury comprehension of legal concepts: can the ‘stagnant pool’ be
revitalised?” (2010) 35 Queen’s LJ 625 at 629.
73 C Haney and M Lynch, “Comprehending life and death matters: a preliminary study of California’s capital
penalty instructions” (1994) 18 Law and Human Behavior 411.
74 G V Rose and J R P Ogloff, “Evaluating the comprehensibility of jury instructions: a method and an example”
75 W Young, N Cameron and Y Tinsley, Juries in Criminal Trials Part Two: A Summary of the Research Findings
76 C Thomas, Are Juries Fair? (Ministry of Justice Research Series 1/10, 2010).
had received on the law of self-defence. While 68 per cent of jurors claimed that they had understood the instruction, when assessed objectively only 31 per cent actually had.\textsuperscript{77}

It has been suggested that there is no reason to be concerned about findings like these because any difficulty individual jurors have in understanding directions will be resolved during the deliberation process.\textsuperscript{78} Deliberation can undoubtedly affect trial outcomes, as noted earlier,\textsuperscript{79} and the studies that have examined the effect of deliberation on juror comprehension provide some support for its effectiveness in correcting mistakes.\textsuperscript{80} However, its curative power should not be over-stated.\textsuperscript{81} Deliberation will be effective in this respect only if, as Diamond puts it, “a significant proportion of the jurors begin deliberations with correct information; otherwise, deliberation may simply reinforce the inaccuracies of the majority”.\textsuperscript{82} In Rose and Ogloff’s study of the comprehension of the conspiracy direction, deliberation made no difference\textsuperscript{83} and the complexity of the direction may have been the reason why.

It might be questioned at this point how much of the preceding discussion is relevant to the types of jury direction that are the subject of this report. Directions on eyewitness identification evidence, confession evidence or accomplice evidence are relatively straightforward compared to some of the instructions that have been the subject of research. Juror comprehension levels have been shown to vary depending on the type of instruction,\textsuperscript{84} with directions on procedural law generally being better understood than those on substantive law.\textsuperscript{85}

Having said that, there is no harm in ensuring that jury directions are as linguistically straightforward as possible, while of course also retaining their legal integrity. This has been recognised in other jurisdictions – the New Zealand Institute of Judicial Studies, for example, has employed editors with expertise in writing plain English in the preparation of the Criminal Jury Trials Bench Book.\textsuperscript{86} Indeed, experimental research has demonstrated that comprehension can be substantially improved by the use of simple language and straightforward syntax.\textsuperscript{87} Charrow and Charrow, for example, found that juror comprehension improved by between 35 to 41 per cent (depending on the measure of comprehension used) when they re-wrote 14 US civil jury instructions in simpler language.\textsuperscript{88} In the

\textsuperscript{77} At 36.

\textsuperscript{78} See e.g. Young, Cameron and Tinsley, Juries: A Summary of the Research Findings (n 75) para 7.25.

\textsuperscript{79} See discussion and references at n 20.


\textsuperscript{81} Comiskey (n 72) at 641.

\textsuperscript{82} Diamond (n 80) at 565.

\textsuperscript{83} Rose and Ogloff (n 74) at 426.

\textsuperscript{84} Comiskey (n 72) at 642.

\textsuperscript{85} A Reifman, S M Gusick and P C Ellsworth, “Real jurors’ understanding of the law in real cases” (1992) 16 Law and Human Behavior 539 at 546-547.

\textsuperscript{86} As noted by the New South Wales Law Reform Commission (n 70) (referencing email correspondence between them and the New Zealand Institute at para 3.25 n 35).

\textsuperscript{87} For a review of the relevant research, see e.g. Rose and Ogloff (n 74) at 427-429; J D Lieberman and B D Sales, “What social science teaches us about the jury instruction process” (1997) 3 Psychology, Public Policy and Law 589 at 626-627.

\textsuperscript{88} R P Charrow and V R Charrow, “Making legal language understandable: a psycholinguistic study of jury instructions” (1979) 79 Colombia LR 1306 at 1331. The instructions were on issues including causation, witness credibility, expert evidence and negligence. The authors set out a method for improving comprehension at
criminal context, other studies have achieved similar results. The re-written instructions in all of these studies were approved by trial judges, who checked that the re-write was legally acceptable.

The content of the warning

If jury directions are to be effective, they need to convey accurate information about, for example, the factors that have been shown to influence the accuracy of eyewitness identification. Instructions in some jurisdictions have been criticised on the basis that they either omit important information (such as the detrimental effect of stress on accuracy, the “weapon effect” or the particular difficulties involved in cross-racial identifications) or are actively misleading (for example by suggesting that eyewitness confidence at the time of the trial is an indication of accuracy). The Scottish Jury Manual is not immune from criticism in this respect as it presently suggests that trial judges ask jurors when evaluating eyewitness identification evidence to consider inter alia “[h]ow positive have the identifications been, both in court and at the identification parade”. The experimental research suggests that, if anything, jurors should be directed that confidence at the time of the trial is not an indicator of accuracy.

Experimental research has also suggested that juries are more likely to follow directions if it is explained to them why they are being given. In the present context, this implies that a jury direction on, say, eyewitness identification evidence or confession evidence, ought perhaps to explain to the jury that people have been wrongly convicted on the basis of flawed evidence of this nature, or that errors in identification (or false confessions) have occurred in the past. In this respect, the content of reported directions given by Scottish trial judges is more positive. In McLean...

v HM Advocate, 97 for example, the trial judge had drawn attention to the fact that “mistakes about identification have been made in court cases in the past and these have to be guarded against” (whilst also stressing that “it does not follow ... that mistakes have been made here”) and the appeal court praised this as a “careful” direction. 98 Likewise in Farmer v HM Advocate, 99 the trial judge advised the jury that “it is well known that errors in identification can arise” and that “[t]here have been cases of mistaken identity”. 100 The sample direction in the Scottish Jury Manual states that “errors can occur in identification ... [m]istakes about identification have been made in court cases in the past” and that “[t]hese have to be guarded against”. 101

Providing written jury directions

A final consideration is whether jury directions should be provided in writing. Although the issue has not received much attention in Scotland to date, numerous law reform bodies 102 and researchers 103 in other jurisdictions have argued for the jury to be given a written copy of the trial judge’s charge to be taken with them into the jury room. In New Zealand the jury research project undertaken in 2001 resulted in the extensive use of written directions in that jurisdiction 104 and they are increasingly used in Canada 105 and in some US jurisdictions. 106

It has been argued that written directions can lead to a number of benefits, including improvements in memory; 107 improvements in comprehension; 108 better quality deliberations (in that more time is spent applying the law); 109 reduced deliberation time (as juries spend less time trying to recall the

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98 At para 4.
100 At 987.
101 Judicial Institute, Jury Manual (n 94) at 16.2.
102 Sources are too numerous to list fully here but see e.g. R E Auld, Review of the Criminal Courts of England and Wales (2001) 533; New South Wales Law Reform Commission, Jury Directions (n 70) at para 6.121; New Zealand Law Commission, Juries in Criminal Trials (Report 69, 2001) para 314; Victorian Law Reform Commission, Jury Directions (Final Report 17, 2009) (recommendations 43 and 44 discussed at paras 6.46-6.60).
103 An early advocate was R F Forston, “Sense and non-sense: jury trial communication” (1975) Brigham Young University LR 601 at 619 (“the advantages of using written instructions are dramatic”). More recently, see e.g. Comiskey (n 72) at 653; M Findlay, “Juror comprehension and complexity: strategies to enhance understanding” (2001) 41 BJ Crim 56 at 74; Devine and others (n 16) at 712; B M Dann, “Learning lessons and speaking rights: creating educated and democratic juries” (1993) 68 Indiana LJ 1229 at 1259.
105 Madge (n 104) at 820.
106 Madge (n 104) at 820; Marder (n 71) at 451.
107 Marder (n 71) at 452; Young (n 104) at 684; L Heuer and S D Penrod, “Instructing jurors: a field experiment with written and preliminary instructions” (1989) 13 Law and Human Behavior 409 at 410; New South Wales Law Reform Commission (n 70) at para 6.119.
109 Forston (n 103) at 619.

directions and any disputes about their content are quickly and easily resolved);\textsuperscript{110} and improvements in juror confidence and satisfaction.\textsuperscript{111} In relation to the first of these, Semmler and Brewer make the point that we are asking an awful lot of juries to retain the information provided by the trial judge – even the simplest charge is likely to run to several pages of instructions – and it may be that at least some barriers to increased comprehension may simply stem from limitations in working memory.\textsuperscript{112}

There is, it has to be said, very little opposition to written directions in the academic and law reform literature. Some possible objections include the fear they might increase deliberation time (because jurors become involved in time consuming arguments over how to interpret them);\textsuperscript{113} that they might be time consuming and burdensome for trial judges to produce;\textsuperscript{114} or that they assume a level of juror literacy that might not be borne out in practice.\textsuperscript{115}

The available research suggests that all (or, at worst, most) of the advantages are borne out in practice and that none of the disadvantages transpire. In England and Wales, a trial judge on the criminal circuit adopted the practice of giving written directions to jurors in all cases for a period of several months. He concluded that this “seems to have almost eliminated requests from juries for reminders or further guidance on the law. Juries also seem to be reaching verdicts more quickly.”\textsuperscript{116} Marder notes that a US judge who has given each juror a written copy of her directions for more than a decade, described the innovation as “wildly successful” and as “an inexpensive, effective way to virtually guarantee juror understanding of the law”.\textsuperscript{117} Admittedly these studies are anecdotal, unscientific and small scale,\textsuperscript{118} but their findings are supported by surveys of real life jurors. These have found that jurors who were not provided with written directions thought that this would have assisted them in their task\textsuperscript{119} and that jurors who did receive a written copy found it useful.\textsuperscript{120}

\textsuperscript{111} Forston (n 103) at 619; Heuer and Penrod (n 107) at 410; New South Wales Law Reform Commission, \textit{Jury Directions}, Consultation Paper (n 108) para 10.16.
\textsuperscript{113} New South Wales Law Reform Commission, \textit{Jury Directions} (n 70) para 6.115; W Schwarzer, “Communicating with juries: problems and remedies” (1981) 69 California LR 731 at 754-755; Lieberman and Sales (n 87) at 626.
\textsuperscript{114} New South Wales Law Reform Commission, \textit{Jury Directions} (n 70) para 6.115; Heuer and Penrod (n 107) at 411.
\textsuperscript{115} New South Wales Law Reform Commission, \textit{Jury Directions} (n 70) para 6.115; Forston (n 103) at 620.
\textsuperscript{116} Madge (n 104) at 821.
\textsuperscript{117} Marder (n 71) at 500 (citing J Connor, “Jurors need to have their own copies of instructions”, \textit{LA Daily Journal}, February 25 2004 at 7).
\textsuperscript{118} As Madge (n 104) himself accepts (at 822).
\textsuperscript{119} B L Cutler and D M Hughes, “Judging jury service: results of the North Carolina administrative office of the courts jurors survey” (2001) 19 Behavioral Sciences and the Law 305 (surveying 1478 people who had served as jurors); Young, Cameron and Tinsley (n 75) at para 7.60 (only 24 per cent of their sample of serving jurors did not think that written instructions would have been helpful – 62.2 per cent thought that they would have been and 13.8 per cent gave no response).
\textsuperscript{120} Young, Cameron and Tinsley (n 75) para 7.59 (where the jury received written directions “they were almost invariably appreciative”).
They are also supported by the findings of experimental research, the most extensive being that of Heuer and Penrod. In their study, 29 judges in Wisconsin randomly assigned their trials so that some juries received written directions and some did not. After the trial was over the jurors were asked to complete questionnaires aimed at testing their understanding of the instructions they received (specifically those relating to the standard and burden of proof, the presumption of innocence, the evaluation of testimony and exhibits and procedural issues such as the allocation of responsibility for findings of law and fact) and were asked a number of questions about their experience of jury service. The researchers also canvassed the views of the judges involved. They found no evidence of any of the potential drawbacks of written directions. They made no significant difference to deliberation time and the judges involved reported that providing them was not burdensome or disruptive. In terms of the possible advantages, jurors reported that the written instructions were very helpful in settling any disputes that did arise. However, the researchers did not find that the written directions led to any improvement in the comprehension of legal concepts. Despite this, the researchers concluded that their results presented “a compelling case” for written instructions and that while they might not have all the advantages claimed of them they did have some and they had no harmful consequences.

Heuer and Penrod are not alone in finding that written directions did not lead to improvements in comprehension, but other studies have reported improvements. Kramer and Koenig, for example, found that jurors who received written instructions did score better on “true/false” tests aimed at measuring comprehension of a wide range of criminal jury directions. Thomas' research with shadow juries in England and Wales found that the proportion of jurors who were able to answer correctly two questions aimed at testing understanding of a self-defence direction rose from 31 per cent to 48 per cent when a written copy of the direction was provided, suggesting that at least some of the incorrect answers were due to failures of memory and not of comprehension.

In fact, a research design that failed to distinguish between memory and understanding may well account for Heuer and Penrod’s finding that written directions did not improve comprehension. In their study the jurors completed comprehension questionnaires some time after the trial.

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121 For an overview of the studies, see Comiskey (n 72) at 653-656; Ellsworth and Reifman (n 80) at 803-804; Lieberman and Sales (n 87) at 626-627.
123 At 416.
124 The mean reported deliberation time was 2.6 hours for written instructions and 2.7 hours for oral instructions (at 421).
125 At 423. See similarly Madge (n 104) at 822; L B Sand and S A Reiss, “A report on seven experiments conducted by District Court judges in the Second Circuit” (1985) 60 New York University LR 423 at 453-456.
126 Heuer and Penrod (n 122) at 421.
127 Jurors were asked six multiple choice questions and the mean correct scores were 6.7 for the written instructions and 6.8 for the oral instructions (ibid).
128 At 429.
129 See A Reifman, S M Gusick and P C Ellsworth (n 85) at 549.
131 Thomas (n 76) at 38.
concluded, the researchers themselves acknowledge. Compare this to Kramer and Koenig’s research, where jurors were surveyed immediately after the conclusion of the trial (and where improvements in comprehension were reported). That said, the role that written directions might play in improving comprehension should not be over-stated. Putting directions in writing cannot compensate for directions that are inherently unclear. As Lieberman and Sales put it, … presenting participants with written versions of unintelligible instructions cannot be expected to be beneficial. If a person does not speak a foreign language, it will not matter if they are given written or verbal instructions in that foreign tongue.

In conclusion, the case for providing written jury directions is compelling, especially if they are to play a more significant role in preventing wrongful conviction following the removal of the requirement for corroboration. They do not appear to have any negative consequences and can lead to significant benefits.

There are some practical issues. It has been suggested that a copy should be given to each individual juror — otherwise there is a danger that the person with the written copy dominates the discussion. There is the issue of whether they should be provided before the oral directions are given or afterwards. In favour of the former, this enables jurors to follow them as the charge is being given. In favour of the latter, there is the danger that the jury will not focus sufficiently on what is being said if they are distracted by the written copy. There is also the issue of juror literacy. It cannot be assumed that all jurors will have levels of literacy that would enable them to read a written text, so provision will need to be made in this respect. Finally there is the question of whether — if written directions are thought to be beneficial — they should be mandatory (in perhaps all but exceptional circumstances) or optional and, if the latter, whether a permissive legislative provision is desirable or whether a recommendation would suffice.

9.4 Conclusion

There have been a handful of studies of the effectiveness of jury directions on eyewitness identification. The findings are mixed, with the most common conclusion being that they have the effect of making juries too sceptical about even strong eyewitness evidence, rather than inducing sensitivity. However, the methodological flaws in these studies mean that it would be unwise to place too much reliance on them and there is evidence from other similar studies that is more

132 The questionnaires were sent out by post after the conclusion of the experiment: see Heuer and Penrod (n 122) at 417.
133 At 423. To this might be added the issue that the survey was by way of a postal questionnaire to which the response rate was only 69 per cent (at 418).
134 A good example here might be the conspiracy direction used by Rose and Ogloff (n 74) where there was no difference in comprehension between those jurors given the oral and the written version.
135 Lieberman and Sales (n 87) at 628.
136 Forston (n 103) at 620.
137 Marder (n 71) at 499; New Zealand Law Commission (n 102) para 314.
138 Madge (n 103) at 821.
139 See e.g. s 55B of the Jury Act 1977 in New South Wales, which provides that “[a]ny direction of law to a jury by a judge or coroner may be given in writing if the judge or coroner considers that it is appropriate to do so”. See similarly s 110 of the Criminal Procedure Act 2004 (Western Australia); s 223 of the Criminal Procedure Act 2009 (Victoria).
140 As noted earlier, there is next to no experimental research on the effectiveness of jury directions in relation to confession evidence or accomplice evidence.
promising. As such, it was concluded from the review of the relevant research that there are grounds for cautious optimism in relation to the effectiveness of jury directions in the areas that are the subject of this report.

In terms of the precise form of words to be adopted, it has already been suggested\(^{141}\) that it would be advisable for an appropriate form of wording to be included in the Jury Manual but that trial judges retain the discretion to tailor this to the circumstances. The findings of this chapter indicate that this wording should be checked not only for its legal and scientific accuracy, but also for comprehensibility, ideally by those with expertise in the use of plain language.

Finally, even if it is accepted that jury directions can provide an adequate safeguard against wrongful conviction, they cannot do so in trials conducted under summary procedure. If sheriffs or lay justices are unaware of the risks posed by certain forms of evidence,\(^{142}\) or about some of the more counter-intuitive findings of the scientific studies,\(^{143}\) this can only be addressed by judicial training. Judicial training may also have a valuable role to play at solemn level in helping trial judges to appreciate when a jury direction is necessary and to craft appropriate directions tailored to the circumstances.\(^{144}\)

### 9.5 Issues for consideration

It has already been proposed in previous chapters that consideration should be given to making jury directions mandatory in cases involving uncorroborated identification evidence, where identification of the accused as the perpetrator is an issue at the trial,\(^{145}\) and discretionary in cases involving other types of evidence.\(^{146}\) In order to maximise the effectiveness of such directions, it is suggested that the Review should consider:

(a) the provision of written directions to jurors (or providing the information in an alternative format to any juror who would have difficulty accessing a written copy);

(b) the wording of sample directions being checked not only for legal and scientific accuracy, but also for comprehensibility, ideally by those with expertise in the use of plain language;

(c) recommending that research be commissioned into the effectiveness of various forms of wording for jury directions.

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\(^{141}\) See ch 5 (eyewitness identification evidence); ch 6 (confession evidence); ch 7 (evidence of accomplices and informers).


\(^{143}\) Such as the “weapon effect” or the absence of a correlation between witness confidence at the time of giving evidence and the accuracy of their identification.

\(^{144}\) This is reflected in the proposals for consideration in ch 5 (eyewitness identification evidence).

\(^{145}\) See ch 5 (eyewitness identification evidence).

\(^{146}\) See ch 6 (confession evidence); ch 7 (evidence of accomplices and informers).
CHAPTER 10: RECORDING OF POLICE INTERVIEWS

James Chalmers

10.1 Introduction

The recording of interviews by the police is not expressly part of the (non-exhaustive) remit of the Post-Corroboration Safeguards Review. The extent to which interviews are recorded was, however, suggested from within the Reference Group as an appropriate topic for the Review’s consideration during the course of the Review’s work, and Lord Bonomy asked the expert group to address this issue as part of its report. Given the stage at which this issue was raised, this chapter is, in comparison to other parts of this report, a relatively brief analysis.

10.2 The concern giving rise to the inclusion of this topic

In Scotland, there is no general published guidance on when police interviews should be recorded, either in audio or visual form. Although the ACPOS Manual of Guidance on Solicitor Access, published in the light of Cadder v HM Advocate, contains detailed guidance on the issue of access to a solicitor, it does not directly address the question of how the interview should be conducted, including how it should be recorded (audio, visually, or in writing). The expert group has been advised that there are no strict rules on this matter.

It has been suggested to the expert group by a criminal defence practitioner that, as a consequence, only interviews conducted by CID officers are audio (or visually) recorded, and that recording is otherwise carried out in notebook form, often in a dedicated interview room where recording facilities are available. While we are not in a position to give an authoritative account of practice in this area, that is not of direct relevance to the question of what is desirable as a matter of principle, although it may — as explained below — be relevant to the question of what recommendations might usefully be made.

10.3 Some further background: the work of the CPT

The Committee for the Prevention of Torture has, in its work examining the conditions in which persons are detained across Europe, consistently pressed for electronic recording of police interviews. It has previously expressed concern about the extent to which police interviews are

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1 There is, however, a UK-wide Code of Practice for the Video Recording with Sound of Interviews of Persons Detained under Section 41 of, or Schedule 7 to, the Terrorism Act 2000 and Post-Charge Questioning of Persons Authorised under Sections 22 or 23 of the Counter-Terrorism Act 2008 (2012).
3 [2010] UKSC 43.
4 Under the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987).
recorded in Scotland. In 2005, the Committee for the Prevention of Torture published a report following a 2003 visit to the UK and Isle of Man. In recommendations relating to Scotland – where, notably, it expressed concern about the lack of any right of access to legal assistance during a police interview – it added:

... the Committee welcomes the fact that, in Scotland, all Criminal Investigation Department interviews are now audio recorded and that police forces are working towards the audio recording of all interviews; it can only encourage the authorities to have this done at the earliest opportunity. Further, the CPT has been informed that individual police forces may introduce video recording of interviews if they have the resources to do so.

The Government’s response stated, however, that it considered “existing practices with regard to the tape recording of interviews should continue to be observed”. A further CPT report published in 2014 did not make any reference to the recording of interviews.

10.4 Practice in England and Wales

In England and Wales, a code (Code E) issued under the Police and Criminal Evidence Act 1984 requires that audio recording be used at police stations in respect of any interview with a person cautioned in respect of any indictable offence, including an offence triable either way. (An offence triable either way is one which can be tried either with a jury in the Crown Court or without a jury in the magistrates’ court.) The custody officer may authorise the interviewer not to audio record the interview in limited circumstances: where equipment has failed or is unavailable, or if it is “clear from the outset there will not be a prosecution”.

The limitation of the requirement of audio recording to offences which are indictable or triable either way means, broadly speaking, that interviewing is not required in respect of offences for which the maximum sentence is six months’ imprisonment or less, that being the maximum sentence which can be imposed by a magistrates’ court.

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6 Report to the United Kingdom Government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to the United Kingdom and the Isle of Man from 12 May to 23 May 2003, CPT/Inf (2005) 1 para 53.
7 Para 59, emphasis in original.
8 Response of the United Kingdom Government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to the United Kingdom and the Isle of Man from 12 May to 23 May 2003, CPT/Inf (2005) 2 para 146.
9 Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 17 to 28 September 2012, CPT/Inf (2014) 11.
11 Code E para 3.3(a): cases where recording is “not reasonably practicable because of equipment failure or the unavailability of a suitable interview room or recording equipment and the authorising officer considers, on reasonable grounds, that the interview should not be delayed”.
12 Code E para 3.3(b). For cases where the interviewee refuses to go into or remain in a suitable interview room, see s 3.4.
The Code of Practice may (along with others) be traced back to the report of the Royal Commission on Criminal Procedure in 1981. The Commission set out the problem which it faced in respect of the recording of interviews as follows:

The frequency of challenges to the police record of interviews is said to make it essential to have some sort of independently validated record in order, in the eyes of some, to prevent the police from fabricating confessions or damaging statements, or, in the eyes of others, to prevent those who have in fact made admissions subsequently retracting them. It is the ‘verbals’ which give rise to most concern, that is the remarks which are attributed to the suspect in the police officer’s subsequent note of the interview but which the suspect is not prepared to endorse by making a written statement under caution. Indeed it is argued by the Circuit Judges that the present methods of recording interviews are themselves the cause of a substantial number of acquittals of apparently guilty defendants. Many of our witnesses also point to the waste of court time caused by disputes about statement evidence.

This language represents particular concerns and practices that existed around the time of the Commission’s work, rather than any kind of universal analysis about the advantages and disadvantages of recording interviews. Nevertheless, it demonstrates that recording of interviews is a practice which can potentially be of benefit to all parties in the criminal justice system. The Scottish courts have acknowledged that the absence of audio or video recording may place the finder of fact at “a huge disadvantage” when drawing conclusions regarding the suspect’s answers.

As the Commission noted, recording gives rise to concerns of cost, although it might be hoped that modern technology has reduced those somewhat (at least in relation to recording itself, but not necessarily summation or transcription).

The Commission was able to draw upon an empirical research study which had been carried out to assist its work, along with other empirical work on English practice, to establish the manner in which police interviews took place and the extent to which the accuracy of statements was challenged. It noted that the amount of court time spent on challenges to statements “[did] not seem to be as great as is supposed”, but regarded such challenges as an undesirability which could be avoided by improving police practice in recording statements. It made a variety of recommendations relating to the improvement of written note taking and discussed the advantages and disadvantages of tape recording (referring to an experiment which the Scottish police had carried out in this regard).

After reviewing a number of other issues relating to police questioning, the Commission recommended that there should be a code of practice, which would “provide strengthened

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15 The Royal Commission on Criminal Procedure: Report (n 14) para 4.2.
16 Beattie v HM Advocate 2009 JC 144 at para 83.
17 The Royal Commission on Criminal Procedure: Report (n 14) para 4.2.
18 Para 4.7.
19 Para 4.9.
20 Para 4.17.
safeguards to the suspect and clear and workable guidelines for the police”.\textsuperscript{21} “The sort of provisions we have in mind should take realistic account of the pressures upon the police and upon suspects and should, therefore, have some degree of flexibility built into them, but exercise of that flexibility should be only upon reasonable grounds and should be accountable.”\textsuperscript{22}

10.5 The PACE Codes of Practice: the legal framework

Section 60 of the Police and Criminal Evidence Act 1984 requires the Secretary of State to issue a code of practice in connection with the tape-recording of police interviews, while section 60A empowers the Secretary of State to issue an additional code of practice for visual recording (which has been done).\textsuperscript{23} More generally, section 66(1) of the Police and Criminal Evidence Act 1984 (as amended) provides as follows:

The Secretary of State shall issue codes of practice in connection with –
(a) the exercise by police officers of statutory powers –
   (i) to search a person without first arresting him;
   (ii) to search a vehicle without making an arrest; or
   (iii) to arrest a person;
(b) the detention, treatment, questioning and identification of persons by police officers;
(c) searches of premises by police officers; and
(d) the seizure of property found by police officers on police premises.

Section 67 contains provisions relevant to the making of the Codes of Practice, requiring the Secretary of State to consult certain specified bodies before issuing a code or a revision thereof, and requiring that, in order for the Secretary of State to bring a code into force, a draft of the necessary statutory instrument must be laid before Parliament and approved by a resolution of each House.

10.6 Analysis

The advantages of audio or visual recording are relatively clear and uncontroversial. Such recording will provide a more accurate record of the interview than note taking, and avoids unnecessary dispute about what was said, something which may avoid not just disputes at the trial but prevent unnecessary trials taking place. As the Royal Commission on Criminal Procedure suggested, it is a safeguard both for the police and for the suspect. Against this, of course, the resource implications inherent in the recording of interviews are potentially significant: even if modern technology allows for a recording to be produced with relative ease, transcription of significant numbers of interviews is time consuming and expensive.

\textsuperscript{21} Para 4.109.
\textsuperscript{22} Para 4.111.
\textsuperscript{23} PACE Code F. There is no requirement to visually record any interview, but para 3.1 sets out a list of cases in which it might be appropriate to do so.
In addition, it should be recognised that any process for the recording of interviews will have disadvantages as well as benefits, and it would be dangerous to assume that any one approach is wholly beneficial. As one author puts it, “the creation of the electronic record itself can introduce bias”. The manner in which a recording is produced or presented can significantly alter the viewer’s perception of it. For example, it is natural to think that a video recording might present the “unvarnished truth”, with the advantage of being able to assess the suspect’s demeanour in response to questions. However, there are inherent problems. Most obviously, a video recording cannot demonstrate what has happened off-camera prior to the interview. Secondly, it is well known that demeanour when answering questions may in fact be a misleading guide to the truth of the answers offered, particularly in the stress of the police interview room. Furthermore, research on the use of videotaped confession evidence suggests that bias and inaccuracy may be introduced by camera perspective, depending on whether the camera is trained on the suspect or the interviewer, or whether a dual camera approach is used. Even where an interview is audio or visually recorded, reliance will at various stages of the criminal justice process necessarily be placed on written records of interviews (whether full transcripts or summaries), and these may themselves be prone to significant error.

None of these reasons are, in themselves, reasons not to audio or visually record interviews. They do, however, suggest that care should be taken in establishing the procedures which should be used for the recording of interviews and the way in which the material which is produced is used thereafter. In England and Wales, this function is fulfilled by the relevant PACE codes of practice. The guidance in these codes goes well beyond a simple statement of when recording should take place.

There could be considerable benefits in similar codes of practice being drawn up for Scotland in terms of clarifying procedure and helping to maintain public confidence in the investigative process. That need not involve the Review prescribing the content of any such code in detail. If the principle of a code were accepted, its content would be a matter for the Cabinet Secretary for Justice following discussions with Police Scotland and other interested parties, subject to any specific requirements of consultation which might be prescribed by legislation. Such discussions would, in particular, have to take into account issues of costs and resource constraints on which the expert group has no relevant information. Similar codes might potentially be developed in other areas, particularly in respect of detention itself.

26 See e.g. Simon, In Doubt (n 24) ch 5.
29 Cf the Crown Prosecution Service’s guidance at n 10 above, which contains “listening policies” setting out when Crown Prosecutors should listen to the tape of an interview and when they may rely on written material without doing so.
Two specific points as to the content of a code may be worth noting here. First, PACE Code E draws the dividing line at offences which are triable only summarily, with anything more serious than that requiring that an interview must be audio recorded. The structure of Scots criminal law does not lend itself to such a simple distinction being drawn, but that would not prevent a code of practice being drafted so as to give reasonably clear guidance on when audio or visual recording would be appropriate.  

Secondly, the question arises as to whether breach of the code should result in any evidence obtained thereby being inadmissible. In principle, such an approach seems unnecessary and could lead to disproportionate results in the event of minor breaches. It would be open to the courts to take into account any breach of the code in applying the general test of fairness applicable to the admissibility of confession evidence.

10.7 Issues for consideration

It is suggested that the Review should consider whether:

(a) a statutory duty, analogous to section 60 of the Police and Criminal Evidence Act 1984, should be placed on the Scottish Ministers to issue a code of practice relating to the recording of interviews of suspects by the police;

(b) it would be appropriate, in cases where the terms of such a code of practice are not followed, that the admissibility of such statements should continue to be subject to the common law test of fairness;

(c) there are any matters within the scope of the Review, not elsewhere covered in this report, which should similarly be addressed by way of a code of practice, particularly the detention, treatment and questioning of persons by police officers.

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31 In a different context, see the Lord Advocate’s Guidelines to the Chief Constable on the Reporting to Procurators Fiscal of Offences Alleged to Have Been Committed by Children (March 2014): the first category of offences which should be reported is those “which require by law to be prosecuted on indictment or which are so serious as normally to give rise to solemn proceedings or the instructions of the Lord Advocate in the public interest”; explanatory notes then provide a list of “common areas of offending” which are likely to fall under this heading. This is not presented here as a suggestion as to where the dividing line should be drawn for any requirement to record interviews in audio or visual form, but simply as an example of how the task of identifying a threshold of seriousness can be approached.

CHAPTER 11: SHOULD THERE BE A STATUTORY SUFFICIENCY TEST FOR PROSECUTORS?

Peter Duff

11.1 Should there be a sufficiency test for prosecutors?

The first question to ask is whether the individual prosecutor should use a set standard for assessing whether there is sufficient evidence to justify a prosecution in an individual case. In order to answer this, it is important to recognise that the most significant aspect of the Scottish system of prosecution is its complete independence, a status which has long been established and frequently emphasised. It is accountable to the Scottish Parliament through the Lord Advocate but, except in very high profile cases, individual decisions by prosecutors are extremely unlikely to be raised in Parliament. Consequently, the Scottish prosecutor has a broad discretion and acts in the “public interest”, in practice a broad, catch-all notion which allows considerable freedom of action. Thus the Crown has famously been described as “master of the instance”, which means *inter alia* that in any criminal case the prosecutor has a broad discretion whether to bring a prosecution or not.

Since 2001, the Crown Office and Procurator Fiscal Service (COPFS) has issued a *Prosecution Code* which explains briefly the criteria on which its decisions are based. On the issue of the decision whether to prosecute, the Code does not set out one short and superficially simple test, as is done in some other jurisdictions. Instead it starts by explaining that the procurator fiscal must be satisfied that there is “sufficient admissible evidence” to justify commencing proceedings. The Code, after describing the corroboration requirement, notes that the prosecutor will have to assess whether the evidence is admissible. The latter part of this guidance, or something similar, may be expected to remain in the post-corroboration era.

More pertinently, the *Prosecution Code* goes on to explain that while there might be sufficient admissible evidence, “consideration must also be given to the reliability of that evidence”. This requires an assessment of the “quality” of the evidence and relevant issues might be the existence of contradictory evidence or “information which suggests that a witness is unable to provide an accurate account of events”. The Code then deals with credibility, observing that there might be doubt about the credibility or truthfulness of a witness’s evidence because of apparently credible contradictory evidence, or a witness’s known dishonesty, or prior inconsistent statements made by the witness. It explains that the Crown may take this into account in assessing whether there is

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6 Ibid.
7 Ibid.
sufficient evidence. The Code then turns to public interest considerations, but these need not concern us here. Thus, the *Prosecution Code* makes it clear that the prosecutor will assess the quality of the evidence in determining whether there is sufficient evidence to proceed with a prosecution.

11.2 What should the sufficiency test be?

The first issue to discuss is whether it would be advantageous to set out a more succinct and precise sufficiency test which a prosecutor will apply in deciding whether the evidence justifies a prosecution before going on to consider whether it would be in the public interest. For example, the English *Code for Crown Prosecutors*, issued by the Crown Prosecution Service (CPS), stipulates that the prosecutor “must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction”. It states that this means that a reasonable jury or bench of magistrates is “more likely than not to convict” the defendant.

The *Code for Crown Prosecutors* explains that this decision should be based on the prosecutor’s “objective assessment of the evidence” including issues of admissibility, reliability and credibility. It might be thought advantageous for the Scottish *Prosecution Code* to contain an equivalent to this apparently simple and straightforward standard. A “realistic prospect of conviction” test would be readily understandable by the public and gives the prosecutor more guidance than the present rather opaque guidelines. To some extent, of course, it must be accepted that whatever formulation is used will be susceptible to different interpretations by different prosecutors, so the precision of the standard is perhaps somewhat deceptive. Certainly, academic research funded by the CPS revealed that prosecutors differed as to the precise interpretation of the test and some observed that this was inevitable given its imprecision. Nonetheless, the introduction of such a test to Scotland would seem beneficial, being clearer than that embodied in the current Scottish Code.

The question then becomes what the test should be? It might be thought that the “realistic possibility of conviction” standard used in England could usefully be adopted in Scotland. In this context it is useful to look at the deliberations of the Royal Commission on Criminal Procedure which *inter alia* led to the creation of the CPS. Its report observed that there were differing views among prosecutors as to what the evidential criterion for prosecution should be. There was general agreement that the minimum acceptable standard was “the existence of a *prima facie* case”, namely evidence that, if accepted, would justify a conviction by a reasonable jury or magistrates’

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9 Ibid.
10 At 6.
13 Para 4.5.
14 Ibid.
15 Para 4.6.
18 Para 8.8.
court. Some, however, did not consider this to be a sufficiently robust test,\textsuperscript{19} including the Director of Public Prosecutions, who at that time was responsible for a small number of prosecutions in the most serious of cases. He gave evidence to the Royal Commission that, in cases where his department was involved, the test was whether there was “a reasonable prospect of conviction; in other words whether it seems more likely that there will be a conviction than an acquittal”\textsuperscript{20}. In the Commission’s view, there was an “underlying rationale” for the adoption of this type of standard: “it is both unfair to the accused and a waste of restricted resources” to prosecute someone if appears that he is “more likely than not to be acquitted”.\textsuperscript{21} It went on to observe that this did not mean that cases where the prosecutor “had doubts” about the strength of the evidence should not be prosecuted because it was right to “let the court decide”\textsuperscript{22} in doubtful cases. However, where it is apparent that there is “no reasonable prospect of conviction”, the case can hardly be described as doubtful.\textsuperscript{23} The significance of this test in the current Scottish context is that it clearly requires the prosecutor not simply to assess whether, taking the evidence at its highest, there is a\textit{prima facie} case but also to consider whether the evidence is “likely to be accepted” by the decision maker. Although the Royal Commission did not state this explicitly, it obviously meant that the DPP’s staff considered the reliability and credibility of the evidence before making a decision whether to prosecute and the Commission assumed that this would continue to be done by any successor organisation. While the\textit{Prosecution Code} encourages procurators fiscal to assess the potential credibility and reliability of the evidence, it has often been implied in the current debate over corroboration that this involves a purely quantitative test — are there two independent pieces of evidence? — and not a qualitative assessment.\textsuperscript{24} Indeed, the Lord Advocate appeared to suggest as much in his evidence to the Justice Committee on the abolition of corroboration.\textsuperscript{25}

Returning to English criminal procedure: notwithstanding the Royal Commission’s approval of a “reasonable prospect” of conviction standard, the test adopted in the first version of the\textit{Code for Crown Prosecutors} was that there should be a “realistic prospect of conviction”.\textsuperscript{26} No reason for this preference was given, although one assumes that it was thought that both tests were much the same. In contrast, the Scottish Government, in its recent Consultation Paper, opted for “reasonable” without explanation, having canvassed both alternatives.\textsuperscript{27} In theory, one might dispute whether these tests are the same but there is little point in embarking upon an arid discussion of the

\textsuperscript{19} Ibid.
\textsuperscript{20} Para 8.8.
\textsuperscript{21} Royal Commission on Criminal Procedure: Report (n 17) para 8.9. For more detailed discussion of the rationale for a sufficiency test, see Ashworth and Redmayne,\textit{The Criminal Process} (n 11) 199-200.
\textsuperscript{22} Para 8.9. This was a quote to the Commission rather than the Commission’s own formulation.
\textsuperscript{23} Royal Commission on Criminal Procedure: Report (n 17) para 8.9.
\textsuperscript{24} See Scottish Parliament Justice Committee, 3\textsuperscript{rd} Report 2014 (Session 4),\textit{Stage 1 Report on the Criminal Justice (Scotland) Bill} (6\textsuperscript{th} February 2014) paras 283-305. Lord Carloway also implied that Scottish prosecutors focus on “quantity” rather than “quality” (\textit{The Carloway Review: Report and Recommendations} (2011) para 7.3.2). Similarly, the Scottish Government’s subsequent Consultation Paper,\textit{Reforming Scots Criminal Law and Practice: Additional Safeguards Following the Removal of the Requirement for Corroboration} (2012) talks (at para 14) of the Lord Advocate putting in place and publishing a “qualitative” evidential test to ensure that the prosecutor considers the quality of the evidence in making a decision on sufficiency. The Lord Advocate confirmed that this would be done in his evidence to the Justice Committee: see the Committee’s Stage 1 report at paras 297-299.
\textsuperscript{25} Justice Committee,\textit{Stage 1 Report on the Criminal Justice (Scotland) Bill} (n 24) paras 297-300.
\textsuperscript{26} Hoyano (n 16) at 557.
\textsuperscript{27} Scottish Government,\textit{Reforming Scots Criminal Law and Practice} (n 24) paras 15-16.
terminology. Put simply, a prosecutor will interpret either term flexibly and there will inevitably be some differences in interpretation but both tests imply that the prosecutor should make an “objective” assessment of the credibility and reliability of the evidence and that the possibility of a conviction is far from a forlorn hope. Similarly, there is little to be gained by questioning whether these tests actually equate to the “more likely than not to convict” gloss. For instance, one might argue that there is still a “reasonable” or “realistic” prospect of conviction if the estimated odds of that outcome are 40 per cent, a point made by one of the English prosecutors in the study cited above, and clearly the precise percentage thought to be required to render a prospect “reasonable” or “realistic” is arbitrary. Indeed, as Ashworth and Fionda note, an explanatory memorandum accompanying the 1994 Code for Crown Prosecutors states that this guideline should not be represented as “a 51% rule”, although it is sometimes referred to in these terms.

The reason for the change of wording from “reasonable” (as recommended by the Royal Commission) to “realistic” (in the resulting Code for Crown Prosecutors) is unclear, but for the reasons discussed above it does not particularly matter. Clearly, the “realistic prospect of conviction” is largely a “predictive test”, although in order to ensure consistency, English prosecutors are instructed not to take into account the likely attitude of a particular court (i.e. the perceptions of local magistrates or jurors). Thus, it does depart slightly from pure prediction in that it demands that prosecutors apply a notional and uniform test, or an “intrinsic merits” standard. This formulation, which is based on “second-guessing” the courts, as it were, has survived various revisions of the Code and seems to have worked relatively satisfactorily. Certainly, the Glidewell Committee, which reviewed the performance of the CPS just over ten years after it was created, appeared to assume that the “realistic prospect of conviction” test was unproblematic and instead focused on the public interest considerations in the determination as to whether a prosecution should go ahead. It is also worth noting that there has been little adverse criticism of this test from the academic community, commentators tending to focus on the more controversial public interest criteria, which comprise the second leg of the test, to determine whether a prosecution should take place. In our view, COPFS could adopt the realistic or reasonable prospect of conviction test because it is sensible, readily understandable and is clearer than the rather vague criteria set out in the current COPFS Prosecution Code. Further, as Ashworth and Fionda observe: “Although there are rival tests, it seems difficult to find a formula that is more precise”.

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28 Para 16.
29 Hoyano and others (n 16) at 599.
30 This is demonstrated by academic discussion of whether “beyond reasonable doubt” means a level of certainty above 99%, 95% or 90%. See e.g. L M Solan, “Refocusing the burden of proof in criminal cases: some doubt about reasonable doubt” (1999) 78 Texas LR 105.
32 See e.g. P Hungerford-Welch, Criminal Procedure and Sentencing, 8th edn (2014) 19.
33 See Ashworth and Redmayne, The Criminal Process (n 11) 201-202, quoting from a 1996 explanatory memorandum issued by the CPS: “if local considerations of this nature were allowed to influence the decision to prosecute, the goal of consistent decision-making would be lost”. 
35 Ibid.
37 Cf Ashworth and Redmayne, The Criminal Process (n 11) 200-203.
38 Ashworth and Fionda (n 31) at 895.
Evidence submitted to the Justice Committee by COPFS indicated that in the absence of a corroboration requirement, this would in fact happen: a new prosecution test would require prosecutors to consider whether there is “a reasonable prospect of conviction in that it is more likely than not that the court would find the case proved beyond a reasonable doubt”.  

### 11.3 Should the sufficiency test be statutory?

The issue here centres round accountability and the question is whether the traditional independence of the Scottish prosecutor should be constrained in this area by rendering the “realistic prospect of conviction” test, or an alternative, into statutory form. Given the long-standing and widely accepted principle of prosecutorial independence in Scotland, the arguments for creating a statutory sufficiency test would need to be strong in order to justify taking this step. The English test is not embodied in legislation, although a complainant who is dissatisfied with a decision not to prosecute by the CPS can seek a review of that decision under the Victims’ Right to Review scheme introduced in 2013. Decisions of the CPS decisions are also subject to the judicial review process, something that is made clear in the guidance notes that accompany the Right to Review scheme. This issue is discussed further below, but it is sufficient for now to note that judicial review of the equivalent decision in Scotland is generally thought not to be competent. It is significant that our comparative research indicates that none of the other Commonwealth jurisdictions have a statutory sufficiency test to guide the prosecution service; in all cases, a sufficiency test is contained in prosecution codes or guidelines. The Scottish Government’s consultation paper arrived at the same conclusion and observed that the latter option would be much more flexible, which would be an important advantage when introducing a new test which might possibly need some fine-tuning. For these reasons, the Scottish Government favoured leaving the setting and application of the test to the Lord Advocate and this conclusion seems correct.

Furthermore, a statutory test gives rise to other possible disadvantages. If legislation were to be enacted, the primary purpose would presumably be to provide a strong remedy for the complainer, or his or her relatives in a situation involving a death (for instance, culpable homicide or careless driving), who is dissatisfied with the prosecution’s decision not to bring proceedings in the criminal courts. This raises the problem of vexatious litigation, sometimes cited as a reason for the very strict controls on private prosecution in Scotland. It would seem inconsistent virtually to have abolished private prosecution for this reason and then to introduce an alternative route to court for the

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40 See **CPS, Victims’ Right to Review Guidance (2014) (issued by the Director of Public Prosecutions)**.
41 Para 48. See also Lord Justice Hooper and D Ormerod (eds), **Blackstone’s Criminal Practice 2011 (2010) paras D2.16-2.18**; Hungerford-Welch, **Criminal Procedure and Sentencing** (n 32) 22.
42 See ch 16.
43 **Scottish Government, Reforming Scots Criminal Law and Practice** (n 24) para 17. Cf the view of the Dean of the Faculty of Advocates who was worried that such a test could be changed too easily and thus would not provide a sufficient safeguard against weak prosecutions and potential miscarriages of justice (Justice Committee, **Stage 1 Report on the Criminal Justice (Scotland) Bill** (n 24) paras 301-302).
44 For analysis of private prosecution, see Gordon, **Renton and Brown: Criminal Procedure** (n 3) paras 3.09-3.15.
vexatious litigant. Further, if prosecutorial decisions over sufficiency were sometimes actually to be overturned by Scottish courts in practice – unlikely except in the most egregious of cases – this would lead to an inconsistent approach to suspects, dependent on the attitude of the complainer. If such challenges were rarely upheld, as is likely, then the existence of the possibility of challenging such a decision might be seen as mere tokenism or, at best, a safety valve only to be used in the most extraordinary of circumstances (much as the vestigial right of private prosecution was used in the “Glasgow rape case”). If such challenges were rarely upheld, as is likely, then the existence of the possibility of challenging such a decision might be seen as mere tokenism or, at best, a safety valve only to be used in the most extraordinary of circumstances (much as the vestigial right of private prosecution was used in the “Glasgow rape case”). It might be asserted in response that a statutory test would be clearer to the public than a COPFS guideline but there is little basis for such a claim.

Then there is the question of the remedy for breaches of a statutory test: would the court, leaving aside the difficult question of whether it would be the Court of Session or High Court, order a prosecution to take place or would it remit the matter back to the Lord Advocate for reconsideration? Further, would the accused be given a similar right? If so, would they challenge the decision to prosecute them as being contrary to the statutory test prior to appearing in the criminal court as part of the ordinary criminal proceedings, or would their objections to being prosecuted simply be dealt with at a preliminary hearing or first diet? Who else might be entitled to enforce the statutory test besides complainers (or relatives of the deceased) and accused? For instance, in a case where a police officer is assaulted and the procurator fiscal decides not to prosecute, would the Police Federation be entitled to challenge this decision? We raise these questions simply to illustrate the difficulties that would be faced if a statutory sufficiency test were to be imposed on prosecutors. In our view, they are sufficient to persuade us that it would not be wise to create a statutory sufficiency test.

11.4 Should it be possible to judicially review prosecutorial decisions?

As noted above, in England decisions by the CPS whether to prosecute a suspect are open to judicial review. In Scotland, while there is no direct precedent, it seems generally to be assumed that the equivalent decisions by COPFS cannot be judicially reviewed. At any rate, attempts to do so have not been a feature – or at least a significant one – of Scottish criminal procedure.

This may change following the Victims and Witnesses (Scotland) Act 2014, section 4 of which requires the Lord Advocate to “make and publish rules about the process for reviewing, on the request of a person who is or appears to be a victim in relation to an offence, a decision of the

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45 See Scottish Government, Reforming Scots Criminal Law and Practice (n 24) para 14, which refers to a need to implement a qualitative sufficiency test to prevent “frivolous, malicious or vexatious” cases from entering the system.


47 For further discussion of this jurisdictional point, see the discussion of judicial review below.

48 In some civilian jurisdictions the partie civile procedure, whereby alleged victims can attach themselves to the prosecution, has been utilised by various interest groups: see e.g. J Hodgson, French Criminal Justice: A Comparative Account of the Investigation and Prosecution of Crime in France (2005) 31 n 150.

49 See text attached to n 41 and accompanying references.

50 Law Hospital NHS Trust v Lord Advocate 1996 SC 301 at 309-310 per Lord President Hope. In our view, there is nothing in this decision to prevent judicial review of a decision not to prosecute and we deal with this point in the text below.

51 Cf Szula v United Kingdom (2007) 44 EHRR SE19, where it is recorded that S had presented a petition for judicial review of a decision not to prosecute but accepted that there was “no merit” in proceeding following advice from senior counsel.
prosecutor not to prosecute a person for the offence”. \(^{52}\) This gives effect to one requirement of the EU Victims Directive. \(^{53}\) Although section 4 of the 2014 Act provides only for an internal review procedure, the Cabinet Secretary for Justice advised the Justice Committee that it would “place obligations on the Lord Advocate that will be challengeable in judicial review”. \(^{54}\)

This mechanism will render the Scottish prosecutor more accountable but, of course, it raises many of the same problems as the creation of a statutory test. However, the English experience suggests that challenges – at least at the level of judicial review – are likely to take place only in exceptional cases.

In England (as in Scotland following the provisions of the 2014 Act), different approaches are taken to the decision to prosecute a suspect and the decision not to prosecute. The decision to prosecute is not amenable to judicial review in the absence of allegations of dishonesty, bad faith or other exceptional circumstances. In essence, it cannot be challenged on the grounds that it is perverse or unreasonable because that decision can always be challenged by the defence at trial or through an appeal following conviction. In Scotland, similarly, a decision by COPFS to prosecute could be challenged through a plea of oppression at trial or following conviction by way of an appeal, although it is clear that the criminal courts would be extremely reluctant to uphold such a plea and unclear what principles would underlie this exercise. \(^{55}\)

In England, as regards the decision not to prosecute, the courts are more open to challenges because “judicial review is the only means by which the citizen can seek redress against a decision not to prosecute and if the test were too exacting an effective remedy would be denied”. \(^{56}\) Nevertheless, this power should be used only “sparingly”, \(^{57}\) for instance, if the decision is in breach of the Code or “perverse”. \(^{58}\) In Scotland, until section 4 of the 2014 Act is implemented, there exists no remedy against a decision by COPFS not to prosecute, except that of the almost defunct right of private prosecution. \(^{59}\)

It should also be noted that in England, the right of private prosecution is exercised more frequently so this gives another remedy to an alleged victim who is disenchanted by the Crown decision not to prosecute as well as the possibility of judicial review. The Crown can, however, take over any private prosecution and discontinue it.

\(^{52}\) Section 4 was not in force at the time of writing.
\(^{54}\) Justice Committee Official Report, 12 November 2013, col 3604.
\(^{55}\) J Chalmers and F Leverick, Criminal Defences and Pleas in Bar of Trial (2006) ch 19, where it is noted that the English courts are considerably more willing to entertain pleas that a prosecution is an abuse of process, although even in that jurisdiction such pleas will succeed only in exceptional cases.
\(^{57}\) Ibid.
\(^{58}\) R v DPP ex p C [1995] 1 Cr App R 136 at 141. For a discussion of some cases challenging decisions of the CPS not to prosecute following deaths in police custody, see M Burton, “Reviewing Crown Prosecution Service decisions not to prosecute” [2001] Crim LR 374.
\(^{59}\) Cf HM Advocate v Sweeney 1983 SLT 48 (the infamous “Glasgow rape case” and the latter of only two permitted private prosecutions in Scotland in the 20th century). It is fair to say that the exceptional circumstances which arose in that case are unlikely to occur again.
One might however question the generally accepted view that Scots law does not allow judicial review of a prosecutorial decision, that view being based on the decision in *Law Hospital*. Here, the hospital sought permission from the Court of Session to turn off the life support machinery of a patient in an irreversible, vegetative state and an assurance that the cessation of treatment would not amount to a crime. A bench of five judges held *inter alia* that it was not competent for the Court of Session to issue the latter ruling because “[a]ny declaration” of this nature “would not be binding on the High Court... [nor] the Lord Advocate who would be entitled in the public interest” to bring a prosecution regardless of the Court of Session’s intervention. The Lord President emphasised that for this and various other reasons, it would be “undesirable for the Court of Session to attempt to define what does or does not amount to criminal conduct”.

It is difficult to see how the above logic would prevent judicial review of a COPFS decision not to prosecute a suspect. Such a decision would not require any determination of whether specified conduct was criminal. Even where a decision not to prosecute involved some doubt as to whether the conduct alleged of the suspect amounted in law to a criminal offence, the Court of Session could not be required in judicial review proceedings to consider whether it *did* amount to a crime, but at most only whether there was an argument which could be presented to the criminal courts to that effect. Furthermore, the Court of Session has judicially reviewed various decisions by the Scottish Criminal Cases Review Commission (SCCRC) not to refer cases to the appeal court. This is an extremely close analogy because, if the petitioner is successful, the SCCRC must review its original decision and if it changes its collective mind, the case will inevitably come before the criminal courts which cannot refuse jurisdiction. It has not, however, been suggested that judicial review is not competent in this context. In any event, section 4 of the 2014 Act appears to supersede any doubts about the competence of judicial review of decisions not to prosecute.

### 11.5 Issue for consideration

The prosecutorial test which COPFS indicated in 2013 that they would apply in the absence of a corroboration requirement is appropriate. Enshrining this test in statute would not, however, be appropriate. Section 4 of the Victims and Witnesses (Scotland) Act 2014 significantly strengthens the position of victims of crime by giving alleged victims the right to challenge decisions not to prosecute. It is suggested that the abolition of corroboration does not, therefore, require further steps to be taken in terms of the prosecutorial test itself or challenges to decisions not to prosecute, although the Review may wish to consider whether the Lord Advocate should formally be required by statute to publish the prosecutorial test.

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60 *Law Hospital* at 312 per Lord President Hope.
61 At 311.
CHAPTER 12: THE NO CASE TO ANSWER SUBMISSION

James Chalmers

12.1 The introduction of the no case to answer submission in Scots law

At common law, it was open to a judge, when charging the jury, to direct them that there is no evidence in law to support a charge and that they are therefore obliged to return a verdict of not guilty.\(^1\) The courts, however, rejected the argument that the accused should be entitled to move at the end of the Crown case for a charge to be dropped or withdrawn because the evidence led by the prosecution was insufficient.\(^2\) In practice, such submissions were often made at the end of the Crown case where the defence did not intend to lead evidence, but this was with the consent of the Crown and technically incompetent.\(^3\)

The question of whether such a submission should be introduced into Scots law was considered by the Grant Committee in its 1967 report on the work of the Sheriff Court. The Committee could not reach agreement on the matter – which was not obviously within its remit in any case, given that any change would logically have had to apply to all criminal courts – and made no recommendation.\(^4\)

The matter was subsequently revisited by the Thomson Committee in its Second Report in 1975, when the introduction of a no case to answer submission was recommended:\(^5\)

We share the view of those of our witnesses who think that the [existing] procedure places an unfair burden on the defence in that the decision on whether to lead evidence might prejudice the accused’s case. We also agree with the minority of the Grant Committee who think that it is wrong that an accused who wishes to make a submission in law that the prosecution case has not been made out, should be required to peril his whole case on that submission, without the alternative, if it fails, of leading evidence on his own behalf. We consider unjustified the fears of some of our witnesses that the proposed procedure will result in delays arising from successful appeals by the prosecutor against decisions of no case to answer. Like the minority of the Grant Committee we take the view that this will occur in only a small number of cases and is unlikely to be a problem... In our opinion the balance of the argument is in favour of the introduction of a procedure in both solemn and summary cases giving the accused a right to submit that there is no case to answer at the end of the Crown evidence and if the submission is not upheld the right to lead evidence.

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\(^1\) *Kent v HM Advocate* 1950 JC 38. The common law submission remained available despite the introduction of a statutory no case to answer submission: see e.g. *HM Advocate v Purcell* [2007] HCJ 13. It is now regulated by statute: Criminal Procedure (Scotland) Act 1995 s 97A, as inserted by the Criminal Justice and Licensing (Scotland) Act 2010 s 73.

\(^2\) *Kent v HM Advocate* 1950 JC 38 (solemn procedure); *McArthur v Grosset* 1952 JC 12 (summary procedure). In *McArthur*, Lord Justice-General Cooper noted (at 14) that it was open to a judge in summary procedure to indicate at the conclusion of the prosecution case that he was “dissatisfied and not prepared to accept the evidence”, which would result in the prosecutor abandoning the prosecution in “nearly every case”.


\(^4\) *The Sheriff Court* (Cmd 3248: 1967) paras 695-699. The majority of the committee’s members were in favour of the common law rule remaining unchanged.

\(^5\) *Criminal Procedure in Scotland (Second Report)* (Cmd 6218: 1975) para 48.05.

The submission was introduced into Scots law by the Criminal Justice (Scotland) Act 1980, permitting the trial judge to acquit the accused if the prosecution evidence was “insufficient in law to justify the accused being convicted”. This requires the judge to consider only whether there is a legal sufficiency of evidence. It is not open to the judge to consider whether that evidence is credible or should be accepted as true, or whether one interpretation of circumstantial evidence should be preferred over another.

The no case to answer submission was examined by the Scottish Law Commission in its report on Crown Appeals. The Commission considered two questions in particular:

- First, should a judge be permitted to uphold a no case to answer submission on the basis that no reasonable jury, properly directed, could convict of the offence charged? By a majority, the Commission recommended that it should.

- Secondly, should it be possible for a no case to answer submission to result in the charges against the accused being amended? Under the law as it stands, this is not possible. For example, take a case where X was charged with theft, and there is insufficient evidence at the end of the prosecution case to permit a conviction for theft, but sufficient evidence to permit a conviction for reset. As reset is a possible alternative verdict on a charge of theft, the no case to answer submission would fail entirely. In addition, if the defence evidence cured the deficiency in the prosecution case, a conviction for theft would be possible. By a majority, the Commission recommended that there should be no change to this rule.

The government did not accept the first of these two recommendations, and the Criminal Justice and Licensing (Scotland) Act 2010 provided expressly that it is not open to a judge to uphold a submission on this basis.

12.2 How would the submission operate in the absence of corroboration?

The Carloway Review made the following observations on the no case to answer submission, rejecting the suggestion that a trial judge should have the power to withdraw the case from the jury if it would be unreasonable for the jury to convict:

If the requirement for corroboration were to be abolished, there is no need for any further change to the existing law on sufficiency of evidence at the trial stage. The issue for the trial
judge would be the same as it is at present, except that there would be no need for corroboration.

In one sense, this is correct. The question for the trial judge would remain this: has a sufficiency of evidence been led? But the meaning of “sufficiency” would have radically changed, and the substantive question for the trial judge would be very different. The judge would no longer have to ask whether there was corroborated evidence in respect of every element of the offence. Instead, a no case to answer submission would succeed only if there were no evidence in respect of a material element of the offence, or the accused’s identity as the perpetrator.

12.3 No case to answer and directed verdicts in other jurisdictions

England and Wales

In English criminal law, the trial judge may stop the trial at the end of the prosecution case if there is no case to answer. The leading case on this power is *R v Galbraith*, where it was said that the trial judge should approach a submission of no case to answer as follows:

1. If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case.  
2. The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence.  
   a. Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case.  
   b. Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness’s reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury.

The context of the “difficulty” referred to by the court in respect of case (2) was that since 1966 the Court of Appeal had been required to quash a conviction if “under all the circumstances of the case it is unsafe or unsatisfactory”. It seems that this led to a practice whereby counsel would invite the court to rule at the end of the prosecution case that a conviction on that basis would be unsafe or unsatisfactory, adopting the language of the test applicable in respect of an appeal against conviction. The *Galbraith* court suggested that this might wrongly lead a judge to evaluate whether

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16 In practice, a no case to answer submission will occasionally not be directed at a pure evidential deficiency, but will instead be a claim that what has been established by the prosecution evidence does not amount in law to the offence charged (see e.g. *McDougall v Dochree* 1992 JC 154; *Paterson v Lees* 1999 JC 159). This aspect of the submission is not relevant to the present discussion.
17 [*1981*] 1 WLR 1039.
18 At 1042 per Lord Lane CJ. Cf *Doney v R* [1990] HCA 51, where the High Court of Australia, without disputing the approach taken in *Galbraith*, noted (at para 13) that “there is some difficulty in reconciling proposition 2(a)... with proposition 2(b)”.
19 Criminal Appeal Act 1966 s 4(1)(a). See now Criminal Appeal Act 1968 s 2(1)(a): the court “shall allow an appeal against conviction if they think that the conviction is unsafe”.
20 See *Galbraith* at 1040-1041.
or not the prosecution witnesses were telling the truth, something properly to be left to the jury.\footnote{At 1041-1042.} Nevertheless, in considering a case of type (2), it does appear to be permissible for a trial judge to uphold a no case to answer submission on the basis that the prosecution evidence is in a crucial respect inherently unreliable or self-contradictory and inconsistent.\footnote{See e.g. \textit{R v Shippey} [1998] Crim LR 767, where it was famously said that the obligation to take the prosecution case at its highest does not mean “picking out the plums and leaving the duff behind”; \textit{R v Shire} [2001] EWCA Crim 2800.}

In summary procedure, the court may, at the conclusion of the prosecution case, “acquit on the ground that the prosecution evidence is insufficient for any reasonable court properly to convict”.\footnote{Criminal Procedure Rules r 37.3(3)(c)(ii). The court may do so on the defendant’s application or of its own motion.} In principle, questions of credibility are to be disregarded here except in the most clear-cut of cases,\footnote{\textit{R v Barking and Dagenham Justices, ex p DPP} (1995) 159 JP 373 (QBD).} although justices may pragmatically decide that it would be inappropriate to “go through the motions” of hearing defence evidence where the prosecution evidence would be insufficiently credible to warrant a conviction.\footnote{Lord Justice Hooper and D Ormerod (eds), \textit{Blackstone’s Criminal Practice} 2011 (2010) D21.43.} In contrast to trial on indictment, there is no risk of trespassing on the function of the jury by doing so.

\textit{Ireland}

In Irish law, the trial judge can, following the conclusion of the prosecution case, direct the jury to acquit the accused.\footnote{V Conway, Y Daly and J Schweppe, \textit{Irish Criminal Justice: Theory, Process and Procedure} (2010) para 8-38.} The Irish courts have accepted that such submissions are to be dealt with applying the same general principles as are applicable in English law.\footnote{DPP v McManus [2011] IECCA 32.}

\textit{Australia}

In \textit{Doney v R},\footnote{[1990] HCA 51. See also the review of authorities by Bellew J in \textit{R v Paterson (No 4)} [2014] NSWSC 162 at paras 80-83.} the High Court of Australia considered the \textit{Galbraith} test and adopted a stricter approach to submissions of no case to answer, ruling that evidence capable of supporting a conviction should be left to the jury “even if tenuous or inherently weak or vague”.\footnote{\textit{Doney} at para 17. It has been suggested that the \textit{Galbraith} approach is nevertheless appropriate for non-jury trials: M Bagaric, \textit{Ross on Crime}, 6th edn (2013) para 14.1100.} The court rejected the argument that the power of the appeal court to quash unsafe or unsatisfactory convictions necessitated the trial judge having a corresponding power to halt a prosecution on a similar basis.\footnote{At para 18 (citations omitted).}

It is necessary only to observe that neither the power of a court of criminal appeal to set aside a verdict that is unsafe or unsatisfactory nor the inherent power of a court to prevent an abuse of process provides any basis for enlarging the powers of a trial judge at the expense of the traditional jury function. The power of a court of criminal appeal to set aside a verdict on the ground that it is unsafe or unsatisfactory, like other appellate powers, is
supervisory in nature. Its application to the fact-finding function of a jury does not involve an interference with the traditional division of functions between judge and jury in a criminal trial. Nor does the existence in a trial judge or a court of powers to stay process or delay proceedings where the circumstances are such that the trial would be an abuse of process.

**Canada**

In Canadian law, a judge may withdraw the case from the jury if the prosecution have not led evidence upon which a reasonable jury, properly instructed in law, could bring in a verdict of guilty. The judge may not, as part of that process, consider the reliability of the evidence – this would be regarded as trespassing on the function of the jury – and so the judge is not empowered to withdraw a case on the basis that the evidence is “manifestly unreliable”. Instead, the judge must ask whether there is some evidence going to every element of the offence. If there is, withdrawal of the case would be inappropriate.

**New Zealand**

Under the Criminal Procedure Act 2011, the court may dismiss a charge if, in a jury trial, “as a matter of law, a properly directed jury could not reasonably convict the defendant” or, in judge-alone procedure, if there is “no case to answer”. In judge-alone procedure, this means that the judge must ask “whether, on the evidence before the court, [they] could find the offence proved beyond reasonable doubt.”

**South Africa**

Section 174 of the Criminal Procedure Act, 1977 provides as follows:

If at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty.

Although the statutory provision refers to “no evidence”, the courts have interpreted this as meaning “insufficient evidence for a reasonable man to convict upon”. The credibility of evidence

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31 Formerly the judge would direct the jury to acquit, but the procedure changed following the decision of the Supreme Court of Canada in *R v Rowbotham; R v Roblin* [1994] 2 SCR 463.
33 *Shephard* at 1087 per Ritchie J.
34 The case law on this point is extensive: see M C Plaxton, “Thinking about appeals, authority and judicial power after *R v Sheppard*” (2002) 47 Crim LQ 59 at 60-61.
35 s 147(4). If a charge is dismissed, the defendant is deemed to be acquitted on that charge: s 147(6). This replaces the power to discharge an accused under s 347 of the Crimes Act 1961.
37 *S v Shuping* 1983 2 SA 119 (BSC) at 120, quoting (in English) from *S v Khanyapa* 1979 (1) SA 824 (A) at 838 (itself in Afrikaans).
is relevant at this stage only to the extent that evidence may be ignored if “it is of such poor quality that no reasonable person could possibly accept it”.\(^{38}\)

In the same case where that test was formulated, however, it was said that the court could decline to return a verdict of not guilty if, despite the evidential deficiency, there is “a reasonable possibility that the defence evidence might supplement the State case”.\(^{39}\) This discretion was initially recognised when preparatory examinations were regularly held in Supreme Court cases, potentially providing the court with information from which such a conclusion might be drawn.\(^{40}\) In the absence of a practice of this nature, there is likely to be limited room for a trial judge to exercise a discretion of this nature. In recent years, the discretion has been the subject of a number of decisions\(^{41}\) which appear to have moved towards the proposition that the court is obliged to discharge the accused “if there is no possibility of a conviction other than if he enters the witness box and incriminates himself”.\(^{42}\)

**United States of America**

In *Jackson v Virginia*,\(^{43}\) the US Supreme Court held that the constitutional guarantee of due process prohibits conviction “except upon sufficient proof – defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense”.\(^{44}\) It is not enough simply to direct the jury on the reasonable doubt standard: there must be a mechanism for challenging the sufficiency of the evidence. While such challenges may be dealt with on appeal, “[a]lmost all [US] jurisdictions provide for a motion for judgment of acquittal that can be presented at the end of the prosecution’s case, at the end of the presentation of evidence by both sides, and after the discharge of the jury”.\(^{45}\)

Because *Jackson* was not concerned directly with directed acquittals, it did not discuss what the test should be, but it suggested that the “prevailing criterion” in federal trials was to ask whether “‘reasonable’ jurors ‘must necessarily have a reasonable doubt’ as to guilt”.\(^{46}\)

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\(^{38}\) *S v Mpetha* 1983 4 SA 262 (C) at 265.

\(^{39}\) *Shuping* at 121.

\(^{40}\) See *Shuping* at 120, discussing *R v Krizinger* 1952 (2) SA 401 (W).

\(^{41}\) The case law is reviewed by P J Schwikkard and S E van der Merwe, *Principles of Evidence*, 3rd edn (2008) 564-569.

\(^{42}\) *S v Lubaxa* 2001 2 SACR 703 (SCA), as quoted by Schwikkard and van der Merwe, *Principles of Evidence* (n 41) 567. This leaves open the possibility of refusing a discharge if there is a possibility that a *co-accused* might correct the deficiency in the prosecution case. There must, however, be some reasonable basis for anticipating that the co-accused might do so: see P J Schwikkard, “Arrested, detained and accused persons”, in I Currie and J De Waal, *The Bill of Rights Handbook*, 6th edn (2014) 744 at 768, citing *S v Nkosi* 2011 (2) SACR 482 (SCA).


\(^{44}\) At 316. This, it said, was a consequence of the prohibition on convicting any person without proof beyond reasonable doubt, as articulated in *In re Winship* 397 US 358 (1970).


12.4 Analysis

The above review of practice in other jurisdictions suggests that, in the absence of a corroboration requirement, the Scottish no case to answer submission would be comparatively weak. It would not be unique, however, being broadly similar to the position taken in Australia and Canada, which generally restrict such submissions to cases where there is simply no evidence against the accused in respect of a crucial element of the prosecution case.

One difficulty in this area is that the purpose of the no case to answer submission is surprisingly obscure. While it is consistently found across the major common law jurisdictions, discussion of it generally focuses on the test to be applied, with little said about the underlying rationale. It is sometimes characterised as a safeguard against wrongful conviction, but if the submission existed solely to prevent the conviction of the factually innocent, there would be no reason to locate it at the end of the prosecution case rather than at the end of the trial as a whole.

A better explanation is suggested by the Thomson Committee’s report, where it was said that the submission would avoid the accused being placed in the difficult position of having to choose between periling his entire case on a submission that the evidence was insufficient to convict, or leading evidence on his own behalf. Difficult as such a choice may be, the Thomson Committee’s account does not explain why it must be avoided. An answer is suggested by the Canadian case of R v P (MB), where it was held that the trial judge had erred in allowing the Crown to reopen its case after the defence had announced its intention, following the close of the Crown case, to call certain witnesses. The Chief Justice of Canada (Lamer CJ) explained the principle underlying the court’s decision as follows:

Perhaps the single most important organizing principle in criminal law is the right of an accused not to be forced into assisting in his or her own prosecution. This means, in effect, that an accused is under no obligation to respond until the state has succeeded in making out a prima facie case against him or her. In other words, until the Crown establishes that there is a “case to meet”, an accused is not compellable in a general sense (as opposed to the narrow, testimonial sense) and need not answer the allegations against him or her.

Although the accused is not compellable as a witness, and need not lead any evidence at all, the progress of a prosecution beyond the close of the prosecution case represents a very real form of compulsion on the accused to answer the allegations made against him or her. It is therefore wrong that such compulsion should be placed on the accused unless there is evidence to support the allegations which have been made. On this account, the protection against wrongful conviction which the submission offers remains real, but is incidental to its primary purpose.

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47 See e.g. Scottish Law Commission, Report on Crown Appeals (n 9) para 2.15, although the point is suggested rather tentatively; Scottish Government, Reforming Scots Criminal Law and Practice: Additional Safeguards following the Removal of the Requirement for Corroboration (2012).
48 See above ch 12.1.
50 At para 37 (citations omitted).
51 See also R K Greenawalt, “Silence as a moral and constitutional right” (1981) 23 William and Mary LR 15.
Should the no case to answer submission be broadened?

This understanding sheds light on the test which should be applied. If it is wrong to call a person to account on the basis of no evidence, it is equally wrong to call a person to account on the basis of evidence which is utterly incredible of belief. While it might be suggested that it would trespass on the function of the jury for a judge to consider the credibility of evidence in solemn procedure, this misrepresents the function performed by the no case to answer submission. The judge is not being asked to consider the accused’s guilt or innocence, but instead to consider whether the state has put forward a case which the accused can fairly be called to answer.

This need not involve any significant broadening of the current no case to answer submission. Just as appeals on the ground that a jury’s verdict was unreasonable are only very exceptionally successful,\(^{52}\) successful no case to answer submissions relating to the quality or credibility of the evidence would succeed only in very unusual cases.

If the submission is broadened, what test should be applied?

While the Galbraith test in England allows the trial judge to go beyond the question of whether there is no evidence in respect of a material element of the prosecution case, the extent to which it does so is unclear and appears to have proved difficult to apply in practice. The tests applicable in New Zealand, set out above,\(^ {53}\) seem most clearly suited to avoid this uncertainty. They are consistent with an extremely limited role for the trial judge in assessing the quality or credibility of evidence: as in South Africa, taking this into account only when the relevant evidence is so poor that it could not possibly be accepted by any reasonable person. They also recognise that in summary procedure, where there is no question of the jury’s province being trespassed on, it is legitimate and pragmatic to give the judge greater scope to consider these issues.

12.5 Issue for consideration

It is suggested that the Review should consider whether a judge should be empowered to uphold a submission of no case to answer if, in solemn procedure, he or she considers that as a matter of law, a properly directed jury could not reasonably convict the accused; and in summary procedure, if, on the evidence led by the prosecution, he or she could not find the offence proved beyond reasonable doubt.

Section 97A of the Criminal Procedure (Scotland) Act 1995 permits the accused in solemn procedure, after the close of the whole of the evidence or the conclusion of the prosecutor’s address to the jury, to submit that the evidence is insufficient in law to justify his conviction. If the suggestion above is accepted, it would seem logically to follow that section 97A (and, consequentially, section 97B) should be amended to refer to a submission that no properly directed jury could reasonably convict on the evidence led.


\(^{53}\) See above ch 12.3.
CHAPTER 13: JURY MAJORITY, SIZE AND VERDICTS

James Chalmers

13.1 Introduction

As Duff’s contribution to a collection of comparative essays on jury systems worldwide expresses it, the Scottish criminal jury is “a very peculiar institution”:¹

…it embodies several unique characteristics which may seem very peculiar to those familiar with other versions of the institution. In particular, it comprises fifteen persons; its verdicts may be reached on the basis of a bare eight-seven majority; and it has a choice between three different verdicts—guilty, not guilty, and not proven—which even many Scots regard as illogical and unprincipled.

The simple majority verdict, in particular, has long been regarded with suspicion by comparativists. The first systematic study of miscarriages of justice in the English-speaking world identified the Scottish rule of verdicts by simple majority as a problematic rule which might increase the risk of wrongful conviction.² More recently, international commentators have doubted whether the simple majority verdict can be reconciled with the requirement of proof beyond reasonable doubt, but have suggested that the (equally, if not more, distinctive) requirement of corroboration can justify Scotland’s divergence from the practice elsewhere.³

How did these distinctive features of the Scottish criminal jury develop? Ian Willock, in his history of the Scottish jury, notes that “[t]he number of persons forming the Scottish criminal jury fluctuated considerably before stabilising itself at fifteen”.⁴ Early records demonstrate a clear preference for odd numbers of jurors, something which itself demonstrates a rejection of the English rule of unanimous verdicts in favour of verdict by a majority.⁵ The precise number of fifteen, however, was probably “never a matter of conscious innovation”.⁶ As Willock explains:⁷

...when the central government grew stronger and a more or less permanent supreme criminal court was established, the tidy administrative mind sought first to lay down a rule and then to enforce it everywhere. The number itself was not important; fifteen was simply a not inconvenient choice, as being uneven and already commonly in use; what mattered was to lay down a rule and follow it.

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² E M Borchard, Convicting the Innocent: Errors of Criminal Justice (1932) 234 (discussing the Oscar Slater case, where nine jurors voted for conviction, five for a not proven verdict and one for not guilty).
⁵ At 187.
⁶ At 189, where it is noted that “there appears to be no recorded legislation on the matter”.
⁷ At 190.
Willock suggests that the Scottish majority verdict does not call for any “elaborate explanation”, and that it is the English rule of unanimity “that requires to be accounted for”. As he notes, however, the fact that a verdict was by a small majority was occasionally seen as relevant to sentencing or a plea for the death penalty to be commuted. There is some evidence that this practice continued into the 20th century.

13.2 Previous reviews of the size of the Scottish jury and the majority requirement

The Thomson Committee recommended that the size of the Scottish jury be reduced to twelve, taking the view that a jury of this size would be “just as effective as a jury of fifteen”, and that it was important “that the administration of criminal justice does not take more people than necessary away from their normal work”. This recommendation was not implemented. Alongside this, the Committee recommended that the simple majority verdict be maintained, with the consequence that a guilty verdict could be returned only if seven of twelve jurors agreed. Gerald Gordon strongly dissented on this point, arguing that a 2:1 majority (i.e. eight of twelve jurors) should be required for conviction. The remainder of the Committee did not accept this proposal, considering it unnecessary given the existence of other safeguards (such as corroboration, which had featured significantly in the Committee’s discussion of the jury). The Committee recommended that, were Gerald Gordon’s proposal to be adopted, there should be no possibility of a retrial if the weighted majority required for conviction was not reached; instead, the accused should be acquitted in such cases.

The composition of the Scottish jury was revisited in the Scottish Government’s 2008 consultation on The Modern Scottish Jury in Criminal Trials, which asked whether the number of jurors in criminal trials in Scotland should be reduced, noting the costs associated with the comparatively large Scottish jury. The consultation responses were summarised as follows:

Twenty-five respondents (42%) addressed this question. Of these, a slight majority (54%) was in favour of retaining a jury size of 15. Forty per cent of those who responded argued for a reduction in the number of jurors, with the remaining one consultee providing commentary only. A recurring comment was that the topic should be addressed further by

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8 At 226. He adds at 233 that the issue “is not in itself discussed by Hume or Alison: so much was it taken for granted by them”. This is inaccurate: as noted in ch 2.1, Hume recognised the difficulty of majority verdicts and sought to justify them by reference to the requirement of corroboration.
9 At 232-233.
10 A Brown, The Juryman’s Handbook (1951) 141 “…the proportion supporting the verdict is to some extent supposed to be taken into account by the Home Secretary [sic] in considering recommendation to mercy in the case of the death sentence. (From 1900-1948, 47% of those convicted of murder in Scotland, by unanimous verdict, were executed, but only 33% of those convicted by majority.)” (emphasis in original).
12 The Committee recommended that a verdict of acquittal should be recorded if the jury were evenly divided between conviction and acquittal: para 51.13.
13 Para 51.12. See also the Committee’s discussion of corroboration and the not proven verdict at para 51.05.
14 Para 51.12.
expert reviewers. Another common theme was that the issue of jury size could not be considered separately from debate about majority verdicts and acquittal verdicts.

Although the 2008 consultation was expressly not concerned with the Scottish “three verdict” system,\(^{17}\) it did ask whether – if the size of the jury were reduced – what size it should be and what number of votes should be required to reach a verdict. Most consultees did not answer this question; of those that did, no two respondents offered the same answer. Support was expressed both for simple majority and weighted majority requirements, but no respondent argued that verdicts should be required to be unanimous.\(^{18}\) The 2008 consultation did not result in any change to the size of the Scottish jury or the number of votes required to reach a verdict.

The Carloway Review did not examine questions relating to the composition or verdict of the jury, considering such questions not to be “specifically within its remit”.\(^{19}\) It did, however, suggest that change to the simple majority verdict was unnecessary and undesirable because of the possibility of a retrial if the jury failed to agree.\(^{20}\) Following a further consultation exercise on additional safeguards,\(^{21}\) the Scottish Government proposed that a guilty verdict should be returned only if ten out of fifteen members agreed to it, with the accused being acquitted if the jury failed to reach that majority. A provision to that effect was included in the Criminal Justice (Scotland) Bill when it was introduced into Parliament.\(^{22}\) This approach, along with that proposed by Gerald Gordon to the Thomson Committee, falls short of the near-unanimous qualified majority verdict required throughout the common law world, and it is referred to here as a “weighted majority” rather than a “qualified majority”.

This chapter now proceeds to examine practice in major comparable jurisdictions. It does so by reference to the common law world, where useful comparisons may most easily be made. As will be seen, the common law world differs significantly from Scotland in starting from the presumption that jury verdicts should be reached by unanimity. Although some jurisdictions outwith the common law world contemplate the possibility of verdict by simple majority, they may counterbalance this by greater judicial supervision of the jury (e.g. through permitting an appeal on the facts, judicial involvement in the jury’s decision-making process, or allowing the trial judge or judges to overrule the jury in certain cases),\(^{23}\) limiting the extent to which lessons can usefully be drawn for the relatively narrow issues which are considered here. It will in any event be seen later on that data on the rate of hung juries in England and Wales suggests that the practical consequences of operating a

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\(^{17}\) A point strongly emphasised at para 7.10 of the consultation document.


\(^{19}\) *The Carloway Review: Report and Recommendations* (2011) para 1.0.20; the statement is made in relation to majority verdicts in particular.

\(^{20}\) Ibid.


\(^{22}\) Criminal Justice (Scotland) Bill s 70. This section proposes that if a jury has fewer than 15 members, guilty verdicts will require – where relevant – majorities of the following size: 10 of 14, 9 of 13, or 8 of 12.

\(^{23}\) A broad review of jury systems in a wide variety of jurisdictions (28 in number) can be found in E J Leib, “A comparison of criminal jury decision rules in democratic countries” (2008) 5 Ohio State J of Criminal Law 629.
system of qualified majority verdicts rather than a simple majority one might in fact be very limited.24

13.3 Unanimity: practice in major comparable jurisdictions

**England and Wales**

The requirement that a jury verdict be reached by unanimity is centuries old, frequently dated back to a 1367 decision.25 Just as English law led the way in creating a rule adopted throughout the common law world, it led the way also in removing it, with the Criminal Justice Act 1967 permitting verdicts of 10:2 or 11:1 following at least two hours’ deliberation. A contemporary article explained the rationale for this change in the following terms:26

In an age of highly organised crime there is evidence of bribery and intimidation (“nobbling”) of jurors in important cases involving professional criminals (“the big fish”), leading to disagreements. Complaints have been made by judges and barristers. For the protection of society and the vindication of justice the guilty cannot be allowed to escape conviction. Any step which increases the likelihood of convicting the guilty will improve police morale. Naturally detection of nobbling is not easy, but a number of cases have been known to the police in recent years. The juror who has been approached may be unwilling to give evidence in proceedings against the nobbler, so sanctions cannot readily be applied. He may well fear for his family. Under a 10:2 system it is unlikely that three jurors can be successfully nobbled.

The current law is set out in the Juries Act 1974, which permits a verdict to be returned by ten of eleven or twelve jurors, or nine of ten.27 No such verdict shall be accepted “unless it appears to the court that the jury have had such period of time for deliberation as the court thinks reasonable having regard to the nature and complexity of the case”, and this period must always be at least two hours.28

A different rule applies in courts martial, which comprise a judge advocate and three to seven lay members.29 Decisions of the court martial are taken by a majority of the votes of the members of the court (with the judge advocate having no vote). In the case of an equality of votes on the finding, the court must acquit the defendant.30 In *R v Twaite*,31 the Court Martial Appeal Court rejected an argument that simple majority verdicts were contrary to the right to a fair trial under the ECHR. The court noted that majority verdicts were not, strictly speaking, confined in English law to courts martial (being possible also in the magistrates’ court or appeals to the Crown Court against decisions by justices). It noted that a number of cases concerning the compatibility of courts martial with

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24 See ch 13.4.
27 Juries Act 1974 s 17.
28 s 17(4).
29 Armed Forces Act 2006 s 155.
30 Armed Forces Act 2006 s 160(3). In the case of an equality of votes on sentence, the judge advocate has the casting vote: s 160(4).
article 6 had been heard both in the domestic courts and Strasbourg, and that the compatibility of majority verdicts with article 6 had never been called into question in any of these cases.

The decision in Twaite is important, but the reasoning employed by the court is unsatisfactory. The court offers no explanation for its conclusion that simple majority verdicts are compatible with article 6 beyond the point not having been raised in previous cases.\(^{32}\) Even if that conclusion is correct, the case does not in any way illuminate the question of whether a majority verdict system is desirable as a matter of principle. In the more recent case of R v Blackman,\(^{33}\) the court followed Twaite, observing in addition that there were “good reasons why, in a system of military justice, it is necessary to avoid a ‘hung jury’ for the ordinary run of offences”,\(^{34}\) and that the variety of different jury systems worldwide indicated that there could not be said to be anything objectionable about simple majority verdicts.\(^{35}\)

Although the Twaite court stressed that the use of majority verdicts in courts martial was long-standing,\(^{36}\) it did not note that this had been a matter of some controversy. Shortly after the Second World War, the government had established separate committees to review army and air-force courts martial (the Lewis Committee) and naval courts martial (the Pilcher Committee). The Lewis Committee recommended that unanimity should be required in courts martial.\(^{37}\) The Pilcher Committee noted that recommendation, but a majority of the committee argued that (a) the members of a court martial (“experienced senior officers... well fitted to form a reasoned and independent view”) were not akin to jurors (who “necessarily vary widely in education, knowledge of the world, judgment and character”)\(^{38}\) and that (b) the possibility of retrials would present serious practical difficulties, particularly in the service context, while being unfair to those who would otherwise be acquitted by a majority vote.\(^{39}\) Accordingly, it concluded that majority verdicts should remain. Two of the committee’s six members strongly dissented from this part of its report, endorsing the view of the Lewis Committee.\(^{40}\) The government was later to reject the recommendation of the Lewis Committee, but without giving reasons for so doing.\(^{41}\) More recently, the Judge Advocate General has questioned whether majority verdicts should continue, arguing that

\(\text{\textsuperscript{32}}\) The issue of majority verdicts was raised in R v Martin [1998] AC 917, but was addressed by reference to the doctrine of abuse of process rather than Convention rights. It appears that prior to a policy introduced by the Judge Advocate General in November 2009, it was not the practice to record whether verdicts of courts martial were unanimous or by a majority, and the Twaite court recommended that this policy should be revoked: paras 30-35.

\(\text{\textsuperscript{33}}\) [2014] EWCA Crim 1029.

\(\text{\textsuperscript{34}}\) Para 22.

\(\text{\textsuperscript{35}}\) Para 23, citing Leib (n 23).

\(\text{\textsuperscript{36}}\) Twaite at para 22.

\(\text{\textsuperscript{37}}\) Report of the Army and Air Force Courts Martial Committee 1946 (Cmd 7608: 1949) para 123 (“We have heard no convincing argument as to why the salutary rule that the verdicts of juries must be unanimous, should not be applied in the case of courts-martial.”).

\(\text{\textsuperscript{38}}\) First Report of the Committee Appointed to Consider the Administration of Justice under the Naval Discipline Act 1950 (Cmd 8094: 1950) para 120. The dissenting minority shared this view but argued that this “is not in our opinion an argument against unanimity but for it. It is less justifiable in view of the character of the officers to disregard the opinion of any of them” (page 49).

\(\text{\textsuperscript{39}}\) Paras 121-128.

\(\text{\textsuperscript{40}}\) R E Manning-Buller (later Viscount Dilhorne, Lord Chancellor) and A L Ungod-Thomas (later Ungod-Thomas J).

\(\text{\textsuperscript{41}}\) Courts-Martial Procedure and Administration of Justice in the Armed Forces (Cmd 8141: 1951) 15.
they appear unfair compared to the civilian courts, and noting that New Zealand has recently reformed its military justice system, requiring all verdicts to be unanimous.\textsuperscript{42}

\textit{Ireland}

In Ireland,\textsuperscript{43} majority verdicts have been permitted since the Criminal Justice Act 1984, section 25 of which provides as follows:

1. The verdict of a jury in criminal proceedings need not be unanimous in a case where there are not fewer than eleven jurors if ten of them agree on the verdict.

2. The court shall not accept a verdict of guilty unless the foreman of the jury has stated in open court whether the verdict is unanimous or is by a majority in accordance with subsection (1) and, in the latter event, the number of jurors who agreed to the verdict.

3. The court shall not accept a verdict by virtue of subsection (1) unless it appears to the court that the jury have had such period of time for deliberation as the court thinks reasonable having regard to the nature and complexity of the case; and the court shall not in any event accept such a verdict unless it appears to the court that the jury have had at least two hours for deliberation.

4. The court shall cause the verdict of the jury to be taken in such a way that, where the verdict is one of not guilty, it shall not be indicated whether the verdict was unanimous or by a majority.

5. This section shall not affect the trial of any offence for which the court is required, upon the conviction of the accused, to sentence him to death or any trial commenced before the commencement of this section.

The rationale for introducing majority jury verdicts into Irish law was explained by the Minister for Justice (Michael Noonan) as follows:\textsuperscript{44}

\begin{quote}
We propose... to introduce majority jury verdicts at criminal trials. There has been an increasing number of jury disagreements in recent times with more than a suspicion in some cases that there was an element of intimidation present. This particular reform will avoid the need for a retrial in a case in which not more than two of the 12 jurors disagree.
\end{quote}

Section 24 contains the details of the provision. It proposes that a jury will have to have at least two hours for deliberation before a majority verdict can be accepted. Majority verdicts are being allowed both to convict and to acquit, but we think it is only fair that if a verdict of


\textsuperscript{43} Official consideration of the jury system in Ireland has been limited and has not involved an “overarching review of the operation of the jury system”: T Daly, “An endangered species? The future of the Irish criminal jury system in light of Taxquet v Belgium” (2010) 1 New Journal of European Criminal law 153 at 154. A general account of the Irish jury system can be found in J D Jackson, K Quinn and T O’Malley, “The jury system in contemporary Ireland: in the shadow of a troubled past”, in Vidmar (ed), World Jury Systems (n 1) 283.

\textsuperscript{44} 345 Dáil Debates 1269 (Second Stage, 2 November 1983). The Dáil debates suggest that the desirability of this change was broadly accepted.
acquittal is by majority that fact should not be disclosed. Majority verdicts have long been the law in England and Scotland.

The distinction which is drawn between capital and non-capital cases, whereby majority verdicts are barred in the former but permitted in the latter, is interesting insofar as it indicates an unwillingness to accept majority verdicts in the most serious of cases. It is no longer of practical importance following the abolition of the death penalty in Ireland in 1990.\(^45\) The constitutionality of majority verdicts was upheld by the Supreme Court in 1993, although the court suggested that there were limits to the extent to which majority verdicts could constitutionally be permitted: “a decision might lose its character of being a decision of the jury if the majority requirement was substantially lowered”.\(^46\)

**Australia**

The English common law rule requiring that jury verdicts be unanimous was maintained in Australia, but has been significantly eroded over time.\(^47\) Unanimous verdicts remain essential in the Australian Capital Territory,\(^48\) while the High Court of Australia held in *Cheatle v R*\(^49\) that any trials for offences against the Commonwealth must be determined by majority verdict in order to comply with the Constitution.\(^50\) In *Cheatle*, the court reached that conclusion on the basis of the accepted understanding of jury trial at the time the Constitution was framed, but noted a number of “considerations of principle” which supported its decision. The court expressed these as follows:\(^51\)

> The requirement of a unanimous verdict ensures that the representative character and the collective nature of the jury are carried forward into any ultimate verdict. A majority verdict, on the other hand, is analogous to an electoral process in that jurors cast their votes relying on their individual convictions. The necessity of a consensus of all jurors, which flows from the requirement of unanimity, promotes deliberation and provides some insurance that the opinions of each of the jurors will be heard and discussed. Thereby, it reduces the danger of “hasty and unjust verdicts”. In contrast, and though a minimum time might be required to have elapsed before a majority verdict may be returned, such a verdict dispenses with consensus and involves the overriding of the views of the dissenting minority... Moreover, the common law’s insistence upon unanimity reflects a fundamental thesis of our criminal law, namely, that a person accused of a crime should be given the benefit of any reasonable doubt.

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\(^45\) Criminal Justice Act 1990 s 1. The death penalty is now constitutionally prohibited in Ireland: Constitution of Ireland art 15.5.2. This change (the twenty-first amendment of the Constitution) took effect in 2002, following a referendum in 2001.

\(^46\) *O’Callaghan v Attorney General* [1993] 2 IR 17 at 26 per O’Flaherty J (quoting from the earlier decision of Blayney J in the High Court).


\(^48\) Juries Act 1967 s 38 (ACT).

\(^49\) [1993] HCA 44.

\(^50\) Commonwealth of Australia Constitution Act s 80.

\(^51\) *Cheatle* at paras 7-8, citations omitted.
These considerations notwithstanding, the majority of Australian jurisdictions have legislated to permit majority verdicts in cases other than trials for offences against the Commonwealth. The following table sets out the current legal position in the relevant jurisdictions.

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Majority verdict conditions</th>
<th>Source</th>
</tr>
</thead>
<tbody>
<tr>
<td>New South Wales</td>
<td>A majority verdict is permitted where the jurors have deliberated for not less than eight hours and the court is satisfied that the jury is unlikely to reach a unanimous verdict after further deliberation. A majority verdict is one to which eleven jurors (where the jury consists of twelve members) or ten jurors (where the jury consists of eleven members) agree. Where a jury consists of fewer than eleven members, its verdict must be unanimous.</td>
<td>Jury Act 1977 s 55F</td>
</tr>
<tr>
<td>Northern Territory</td>
<td>A majority verdict is permitted where not less than six hours have elapsed since the jury retired and the jurors are not unanimously agreed. A majority verdict is one to which ten jurors agree, except where a jury consists of only ten members. In such cases, a majority verdict is one to which nine of the jurors agree.</td>
<td>Criminal Code s 368</td>
</tr>
<tr>
<td>Queensland</td>
<td>A judge may ask the jury to reach a majority verdict if the jury has deliberated for eight hours and the judge is satisfied that the jury is unlikely to reach a unanimous verdict after further deliberation. A majority verdict is one to which all but one of the jurors agree, except where a jury consists of only ten members. In such cases, the verdict must be unanimous. Majority verdicts are not permitted in respect of murder or an offence under s 54A(1) of the Criminal Code (demands with menaces upon agencies of government) where the offender would be liable to imprisonment for life.</td>
<td>Jury Act 1995 ss 59-59A</td>
</tr>
<tr>
<td>South Australia</td>
<td>A majority verdict is permissible where a jury has deliberated for at least four hours and a unanimous verdict has not been reached. A majority verdict is one to which ten or eleven members agree (where the jury consists of twelve members). Where the jury consists of eleven members, ten must agree; where it consists of ten members, nine must agree. No verdict that a person is guilty of murder or treason can be returned by a majority.</td>
<td>Juries Act 1927 s 57</td>
</tr>
<tr>
<td>Tasmania</td>
<td>A majority verdict is permissible where a jury has deliberated for at least two hours and a unanimous verdict has not been reached. The rule differs in trials relating to treason or murder, where a majority verdict of not guilty is permissible after six hours deliberation, but any verdict of guilty must always be unanimous.</td>
<td>Juries Act 2003 s 43</td>
</tr>
<tr>
<td>Victoria</td>
<td>Where a jury has deliberated for at least six hours and has not reached a unanimous verdict, the court may discharge the jury or take a majority verdict.</td>
<td>Juries Act 2000 s 46</td>
</tr>
</tbody>
</table>
A majority verdict is one to which all but one of the jurors agree. Majority verdicts are not permitted in respect of murder, treason, or offences against ss 71 or 72 of the Drugs, Poisons and Controlled Substances Act 1981.

| Western Australia | Where a jury has deliberated for at least three hours and has not arrived at a unanimous verdict, the decision of ten or more of the jurors shall be taken as the verdict. Majority verdicts are not permissible on a charge of murder. | Criminal Procedure Act 2004 s 114 |

**Canada**

Canada, it has been said, is the “last remaining country requiring unanimity for the verdict of every criminal trial held within its borders”. The issue was examined by the Law Reform Commission of Canada in its 1980 working paper on *The Jury in Criminal Trials*, when the Commission recommended that the rule be retained, rejecting arguments that had been offered against it. In particular, the Commission noted that hung juries were rare in Canada, amounting to about one per cent of all jury trials, and suggested that a change to majority verdicts could be expected to make only a marginal difference to the number of cases where the jury were unable to reach a verdict. It noted that while the English reforms had been based on the problem of the obstinate or corrupt juror, but with no evidence being presented other than “one or two highly publicized trials in which attempts to interfere with jurors was [sic] alleged”, and with subsequent research having discounted this problem.

The Commission argued that a unanimity requirement was likely to produce a more accurate result, and one which would be more likely to command community confidence. The claim about accuracy was not simply one relating to the avoidance of wrongful conviction. As the Commission explained:

> Empirical research relating to the jury’s deliberative process suggests: first, that minority views are more likely to be expressed and considered under the unanimity rule; and second, that the quality of discussion is superior. From these findings, the greater likelihood of an accurate decision under the unanimity rule can be inferred.

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52 P Sankoff, “Majority jury verdicts and the Charter of Rights and Freedoms” (2006) 39 UBC LR 333 at 333. The Supreme Court of Canada has described unanimity as one of the “fundamental characteristics of criminal jury trials”: *R v Bain* [1992] 1 SCR 91 at para 145 (read with para 146) per Gonthier J (dissenting, but not on this point).


54 At 22. This compared to a rate of 3.5-4 per cent in England and Wales prior to the introduction of 10:2 majority verdicts in that jurisdiction: see ibid, citing HC Debs vol 738 col 56 (Dec 12, 1966).

55 At 23.

56 At 24.

57 Ibid.

New Zealand

As a result of the Juries Amendment Act 2008, juries in New Zealand can return majority verdicts, defined as a verdict “agreed to by all except one” of the jurors.\(^\text{59}\) This will normally be an 11:1 verdict, but the statutory formulation accounts for cases where the trial has concluded with fewer than 12 jurors. In order for a majority verdict to be accepted, the jury must have deliberated for at least four hours, the foreperson must have stated in open court that there is no probability of a unanimous verdict being reached but that a majority verdict has been, and the court must consider that the jury has had a reasonable time for deliberation. This framework replaced the former requirement of unanimity for all verdicts, following a recommendation by the New Zealand Law Reform Commission in its work on *Juries in Criminal Trials*.\(^\text{60}\)

The Commission noted four arguments for retaining the unanimity rule: it reflects the requirement of proof beyond reasonable doubt; it encourages discussion and each juror participating and being listened to; it ensures that the representative character of the jury is represented in the verdict; and it increases community confidence in the verdict and the criminal justice system.\(^\text{61}\)

At the same time, it identified five arguments in favour of majority verdicts: that a unanimity requirement “provides an incentive to intimidate, corrupt or otherwise improperly persuade jurors”; that a unanimity requirement is often met by attrition, meaning that it may simply delay the inevitable; that it is undemocratic; that it is costly; and that it gives rise to compromise verdicts or hung juries.\(^\text{62}\)

Not all of these arguments seem to have been considered persuasive by the Commission – it noted that prosecutors considered that “the risk of [jury tampering] is not great”,\(^\text{63}\) and doubted whether the cost argument was relevant at all,\(^\text{64}\) but it was particularly concerned about hung jury rates of around eight per cent and the possibility of rogue jurors: “in a randomly chosen group of twelve it is possible that at least one will be simply unreasonable and unwilling to participate properly or at all”.\(^\text{65}\) That latter claim was not purely hypothetical, but was supported by research on jury decision-making accompanying the Commission’s work.\(^\text{66}\) The importance of the “rogue juror” to the Commission’s thinking became clear when, in recommending majority verdicts, it expressed its preference for an 11:1 requirement rather than 10:2:\(^\text{67}\)

We consider that the primary reason why majority verdicts are justifiable is that there is sometimes one member of the group who is simply unreasonable or unwilling to properly take into account the views of the others – the rogue juror. It is to eliminate the influence of

\(^{59}\) Juries Act 1981 s 29C, as inserted by the 2008 Act.


\(^{61}\) Para 414.

\(^{62}\) Para 415.

\(^{63}\) Para 416.

\(^{64}\) Para 415.

\(^{65}\) Para 420.

\(^{66}\) See W Young, N Cameron and Y Tinsley, *Juries in Criminal Trials Part Two: A Summary of the Research Findings* (NZLRC Preliminary Paper 37 Vol 2, 1999) paras 9.12-9.13 (five juries in 48 trials were hung; in two cases this was due to “a single ‘rogue’ juror who refused to consider a ‘guilty’ verdict but made little attempt to participate in deliberations, and was unable or unwilling to articulate any rational argument in favour of a ‘not guilty’ verdict”, while in three “the minority jurors provided a clearly articulated and reasoned basis for their dissent”).

\(^{67}\) Para 435.
these people that majority verdicts are arguably required. If two jurors are opposed to the
views of the majority, there is a greater chance that their views are not simply unreasonable
but reflect some genuine basis for doubt which should be debated rather than ignored. For
this reason, we recommend a majority of 11:1.

In its report, the Commission noted the most recent available figures for the rate of hung juries in
New Zealand (for the twelve months to October 2000) showed a hung jury rate of 8.7 per cent (7.8
per cent in the District Court and 13.1 per cent in the High Court). The Commission noted that this
included all cases where the jury was hung on a charge, regardless of whether verdicts were reached
on others, and therefore the rate at which retrials took place would be somewhat lower.\footnote{68}

\textit{United States of America}

In \textit{Apodaca v Oregon},\footnote{69} the Supreme Court held that jury unanimity is not constitutionally required,
and that verdicts of 11-1 or 10-2 were constitutionally valid. Noting its earlier statement that “the
essential feature of a jury obviously lies in the interposition between the accused and his accuser of
the commonsense judgment of a group of laymen”,\footnote{70} the Court continued:\footnote{71}

\begin{quote}
A requirement of unanimity, however, does not materially contribute to the exercise of this
commonsense judgment... a jury will come to such a judgment as long as it consists of a
group of laymen representative of a cross section of the community who have the duty and
the opportunity to deliberate, free from outside attempts at intimidation, on the question of
a defendant’s guilt. In terms of this function we perceive no difference between juries
required to act unanimously and those permitted to convict or acquit by votes of 10 to two
or 11 to one. Requiring unanimity would obviously produce hung juries in some situations
where nonunanimous juries will convict or acquit. But in either case, the interest of the
defendant in having the judgment of his peers interposed between himself and the officers
of the State who prosecute and judge him is equally well served.
\end{quote}

However, despite the decision in \textit{Apodaca}, jury unanimity remains a near-universal rule across the
United States.\footnote{72} Very few states permit non-unanimous verdicts, particularly in felony trials.\footnote{73}

\textit{Analysis}

As the above analysis demonstrates, there is a clear consensus across the common law world (courts
martial aside) that jury verdicts should be reached by unanimity. This is regarded as a consequence
of the requirement of proof beyond reasonable doubt, the presumption of innocence, and the view
that a jury verdict is a collective decision. The verdict is one of the jury as a whole, not simply the
result of counting votes in a ballot. Over time, this rule has been qualified in most – not all –
jurisdictions to permit juries to return verdicts by qualified majority. Qualified majority rules exist

\begin{itemize}
\item \footnote{68}{Para 417.}
\item \footnote{69}{406 US 404 (1972)}
\item \footnote{70}{\textit{Williams v Florida}, 399 US 78, 100 (1970).}
\item \footnote{71}{\textit{Apodaca} at 410-411 (White J).}
\item \footnote{72}{W R LaFave and others, \textit{Criminal Procedure}, 5\textsuperscript{th} edn (2009) 1075.}
\item \footnote{73}{See R Malega and T H Cohen, \textit{Special Report: State Court Organisation}, 2011 (US Department of Justice,
Office of Justice Programs, Bureau of Justice Statistics, 2011) 10.}
\end{itemize}
because of a recognition that in some cases an individual juror, or perhaps two jurors, may not participate properly in the process, because they have been intimidated or have taken an unreasonable or perverse approach to their task. The acceptance of a qualified majority, therefore, does not undermine the principle that the verdict should be one of the jury as a whole. Instead, it recognises that an individual juror or jurors may not be willing or able properly to participate in the collective decision-making process.

Scots law, by contrast, stands entirely apart from this consensus. There is no clear basis on which the simple majority verdict can be reconciled with the requirement of proof beyond reasonable doubt, the presumption of innocence, or the concept of the jury as a body which takes collective decisions. The Scottish approach has consistently been justified on the basis that Scotland applies a unique set of practices in jury trials – corroboration, three verdicts and simple majority verdicts – which, taken together, represent a proper approach to the criminal justice system’s key goal of acquitting the innocent and convicting the guilty. Corroboration’s removal, however, means that this justification no longer holds, and so the other two distinctive features of the Scottish jury require reconsideration.

13.4 What practical effect does a unanimity or qualified majority rule have?

The foregoing review of developments in other jurisdictions has provided some data on the rate at which juries failed to reach unanimous verdicts in certain jurisdictions. Such data is of limited value in the Scottish context given that it is both historic in nature and concerned with rather different criminal justice systems. It is also of limited relevance given that it is unlikely that Scotland will make the radical move from a system requiring a simple majority verdict to one requiring complete unanimity. This is not because removing corroboration is not itself radical – it clearly is, given the extent to which the Scottish criminal justice system has been constructed around that requirement. However, the broad consensus in favour of permitting qualified majority verdicts means that it is unlikely that any response to the abolition of the requirement for corroboration would go so far as to propose a requirement of complete unanimity, much less that the Scottish Government or Parliament would accept such a proposal.

The discussion here therefore focuses on the likely effect of a qualified majority rule. In order to assess this, it is most useful to look to the experience of England and Wales, as both the most proximate and directly comparable jurisdiction and one where comprehensive data is available.

In England and Wales the percentage of convictions reached by unanimity rather than a majority has been remarkably consistent over time: either 81 per cent or 82 per cent in every year from 2007 until 2013. The regularly published statistics do not indicate how often juries fail to reach a verdict, doubtless because this is rare. In 2010, based on data from 2006-2008, Thomas reported that hung juries accounted for 0.6 per cent of all cases where juries deliberated and 0.08 per cent of all charges in the Crown Court, and “in most cases these [were] juries that [had] reached verdicts on at least some charges put to them”. While hung juries were more common in respect of sexual

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75 See ibid table 3.15, which appears to exclude such outcomes from the overall statistics of defendants “dealt with in trial cases”.
77 Ibid 46.
offences, the rate of hung juries remained below one per cent of all sexual offence cases heard by juries in Thomas’s data. 78

Majority verdicts in England and Wales can be reached with either one or two dissenting jurors. Again, a consistent pattern is seen over time: between 2007 and 2013 the percentage of convictions by majority verdict reached with two dissenters rather than one ranged from 59 per cent to 61 per cent. 79 This does not mean that around 40 per cent of majority verdicts would have resulted in a hung jury had English law only permitted a single dissenter. A proportion of two-dissenters juries would have moved to a single dissent or unanimity after further deliberation, but it is impossible to know in how many cases this would have happened.

In 1994, the Scottish Office estimated that if the possibility of a hung jury were to be introduced into Scots law, in line with English practice, the number of retrials which would take place annually could be expected to be in single figures. 80 That remains correct, assuming the English experience were replicated north of the Border. In 2013-14, Crown Office data recorded 359 High Court trials and 1,210 sheriff and jury trials. 81 If juries in both instances hung in 0.06 per cent of cases, that would suggest two hung juries annually in the High Court and seven in the Sheriff Court, a maximum of nine retrials. In some of these cases, particularly those where verdicts had been reached on some but not all of the charges, a retrial would not be in the public interest and would not take place.

13.5 Is the unanimity / majority rule linked to jury size?

Qualified majority rules do not exist because of some sort of numerical calculation. They do not represent a view that a certain percentage of votes for conviction (or acquittal) amounts to proof beyond reasonable doubt. Instead, systems which operate qualified majority rules start from the principle that jury verdicts should be reached by unanimity, but that it is legitimate to modify that rule in order to account for individual jurors whose participation is tainted in some way, perhaps because they are unwilling properly to participate in the deliberations or because they have been intimidated. Such jurors are exceptional, as is reflected by the fact that jury verdicts are likely to be unanimous even where majority verdicts are permitted. They are not a group who might be expected to appear with numerical regularity in each and every jury. It does not, therefore, follow that if a criminal justice system with a jury of twelve members which permitted 10:2 verdicts were to increase the size of its jury, it should also increase the number of dissenting voices which could be overridden by a qualified majority verdict. That is an observation which is of some significance given the current size of the Scottish jury.

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78 This figure is not Thomas’s but has been calculated based on data at pages 27-28 of her report, as follows. There were 423 hung juries in Thomas’s sample, which indicates 186 hung juries in sexual offence cases (44% of hung juries). There were 68,874 verdicts by deliberation (including hung juries), which indicates 21,351 verdicts in sexual offence cases (31% of verdicts). 186 as a percentage of 21,351 is 0.87%.


80 Scottish Office, Juries and Verdicts (1994) para 6.5.

13.6 Jury size: practice in major comparable jurisdictions

England and Wales

The English jury has traditionally been comprised of twelve members. There is no clear rationale for this number, and such explanations as have been offered have been described as “fanciful” or “romantic”. Devlin suggests that “doubtless the reason for having twelve instead of ten, eleven or thirteen was much the same as gives twelve pennies to the shilling and which exhibits an early English abhorrence of the decimal system”. The English choice of twelve members as the appropriate size for the jury set the tone for the rest of the common law world, although when the jury system was implemented in the English colonies in the eighteenth and nineteenth centuries, a composition of twelve members was not considered an essential feature and the size frequently varied. A 1942 survey of Commonwealth practice (in “colonies, dependencies, protectorates and other territories under the jurisdiction of the Crown”, but not Dominions) reported jury sizes ranging from seven to twelve members. In particular, it was common for juries to consist of seven members but twelve in capital cases; or for the use of juries to be restricted to capital cases, where they would comprise seven members.

Ireland

In Irish law, the size of a jury “is not provided for by legislation but traditionally there are 12 members”.

Australia

Twelve is the “standard number of jurors in a criminal trial” in all Australian jurisdictions.

Canada

The Canadian criminal jury is comprised of twelve members. In The Jury in Criminal Trials, the Law Reform Commission of Canada considered whether the size of the Canadian jury should be reduced from twelve. It concluded that smaller juries “would not significantly reduce the cost or increase the administrative efficiency of the jury system”. It noted the argument (bearing some similarities to that made by the Thomson Committee several years earlier) that a reduction in jury size would reduce the overall hardship inflicted on jury members, but argued that this was “of no consequence.

82 C L Wells, “The origins of the petty jury” (1911) 27 LQR 347 at 357.
83 P Devlin, Trial by Jury (1965) 8. See also A Samuels, “Criminal Justice Act” (1968) 31 MLR 16 at 24 (“Twelve is a number wrapped in mythology, not logic”).
84 Devlin, Trial by Jury (n 83) 8.
87 At 150-152, surveying 37 jurisdictions.
89 Chesterman (n 47) at 135.
92 See ch 13.2.
to any individual juror”, and that the Commission’s survey of jurors demonstrated that very few of them actually found jury service to be a hardship. Most importantly, it concluded that:

...a twelve-member jury is more likely to lead to accurate fact-finding than a six-member jury. There is some evidence to suggest that first, a twelve-member jury will be more productive than a six-member jury since there will be a higher probability that someone in the jury will remember essential pieces of information; also the jury have available a wider range of experience and judgment with which to evaluate evidence and correct errors. Second, a twelve-member jury is less likely to be influenced by an “oddball” juror than a six-member jury. Third, members of twelve-member juries are likely to have more robust and searching discussions and to explore more factual issues than six-member juries.

While this might seem like an argument for ever-larger juries, the Commission suggested that a jury larger than twelve – or perhaps fifteen – could be “cumbersome”.

Despite the reference here to “some evidence” (what is unclear) and an earlier reference to “increased knowledge about the psychology of small groups” (again without any citation of relevant evidence) the Commission’s preference for a twelve member jury seems to have had no particular factual basis. It admitted as much in its closing statement: “[t]he twelve-member jury evinces familiar feasibility from which there is no good reason to depart.”

**New Zealand**

The New Zealand jury comprises twelve members. The jury system in New Zealand was recently the subject of an extensive review by the New Zealand Law Reform Commission. However, the Commission’s report does not consider the issue of jury size, except for the possibility of empanelling larger juries in lengthy or complex cases so as to avoid such cases failing because jurors have to be discharged during the course of the trial.

**United States of America**

In the United States, the Supreme Court held in *Williams v Florida* that a jury of twelve members “cannot be regarded as an indispensable component of the Sixth Amendment” right to jury trial.

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93 Law Reform Commission of Canada, *The Jury in Criminal Trials* (n 53) 34. In fact, the Commission argued (at 35) that jury service provided an important educational function: about five per cent of the Canadian population had served on a jury and a further 29 per cent knew someone who had, while persons who had served on a jury were more likely to be in favour of the institution. “Thus, if the jury were reduced to six members, it would affect fewer people and would be less successful in educating the public and increasing confidence in the criminal justice system.”

94 At 35.
95 At 36.
96 At 33.
97 At 36.
99 New Zealand Law Reform Commission, *Juries in Criminal Trials* (Report 69, 2001) paras 277-278. The Commission rejected this possibility, having made recommendations which would permit such cases to be tried by a judge sitting alone.
100 *Williams v Florida* 399 US 78, 98 (1970).
In *Ballew v Georgia*, however, it was held that a five-member jury was not compatible with the right to jury trial. While previous case law had upheld the constitutionality of six-member juries, Justice Blackmun noted various concerns to which that case law had given rise including, in particular, “recent empirical data suggest[ing] that progressively smaller juries are less likely to foster effective group deliberation” and “doubts about the accuracy of the results achieved by smaller and smaller panels”. After reviewing various studies, he concluded:

While we adhere to, and reaffirm our holding in *Williams v Florida*, these studies, most of which have been made since *Williams* was decided in 1970, lead us to conclude that the purpose and functioning of the jury in a criminal trial is seriously impaired, and to a constitutional degree, by a reduction in size to below six members. We readily admit that we do not pretend to discern a clear line between six members and five. But the assembled data raise substantial doubt about the reliability and appropriate representation of panels smaller than six. Because of the fundamental importance of the jury trial to the American system of criminal justice, any further reduction that promotes inaccurate and possibly biased decisionmaking, that causes untoward differences in verdicts, and that prevents juries from truly representing their communities, attains constitutional significance.

While rules on jury size differ from jurisdiction to jurisdiction in the United States, juries of twelve members are consistently required in felony cases, but smaller juries than this are often permitted to try misdemeanours.

### 13.7 What practical effect does jury size have?

As the above review of practice in the common law world demonstrates, twelve has consistently been regarded as the appropriate size of a jury in criminal cases, even though it is difficult to identify an explanation for that size beyond tradition and historical continuity. That does not mean that the widespread preference for twelve members should be dismissed as arbitrary or accidental; the fact that it was fixed “after centuries of trial and error” is at least a plausible reason to suggest, as Zeisel puts it, that twelve might “be the number that optimizes the jury’s two conflicting goals – to represent the community and to remain manageable”.

Leaving Scotland’s preference for fifteen members aside, it is only in the United States that the traditional common law rule has been significantly challenged. Even there, the Supreme Court’s green light to juries of as small as six has not led to widespread adoption of smaller juries in criminal cases, particularly serious ones, and so modern commentators frequently address the issue of jury size only in passing.

The decision in *Williams v Florida* did give rise to a significant body of empirical research comparing the six and the twelve-member jury (and occasionally other sizes smaller than twelve). Such research...

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102 At 232.
103 At 234.
104 At 241.
106 H Zeisel, “...And then there were none: the diminution of the federal jury” (1971) 38 University of Chicago LR 710 at 712.
107 See e.g. Abramson, *We the Jury* (n 25) 180-181.
has provided convincing reasons to prefer the larger of the two options, suggesting that a smaller jury is less likely to be properly representative of the community, by being more likely not to contain members of minority groups; is likely to deliberate for less time (at the expense of better deliberation); and is likely to recall evidence less accurately.\textsuperscript{108} Such research, of course, has not considered jury size in the context of the simple majority verdict, that being a peculiarly Scottish rule.

Given that it seems unlikely any reduction in the size of the Scottish jury below twelve would receive serious consideration, this research is not particularly helpful in the present context, except perhaps to dissuade anyone who might wish to make such a suggestion. The research does not tell us whether a jury of fifteen is advantageous or disadvantageous compared to a jury of twelve.

More general research on group decision-making, however, suggests that group decisions on complex matters are best achieved by finite and relatively small groups,\textsuperscript{109} “there is evidence suggesting that no more than about eight or ten persons can be directly responsive to one another in a group discussion setting, and that mutual responsivity becomes difficult even before that size is reached”.\textsuperscript{110} Elsewhere, twelve members has been suggested as a possible limit for meaningful reciprocal interaction between the members of a group.\textsuperscript{111} While such research might suggest that the size of the Scottish jury should be viewed with some caution, it would be unwise to draw firm conclusions about precise questions of size on the basis of research dealing with decision making in very different contexts to that of the jury room. For example, one study of groups of fifteen to twenty-two members observed that the groups felt it necessary to split into sub-groups in order to operate effectively, but that was concerned with student groups working intermittently over a fifteen week period, which is very different to the task performed by a jury.\textsuperscript{112}

None of this would provide any convincing basis for arguing that the Scottish jury should be reduced in size to twelve members (or some other number) if no other changes were in contemplation. It should be borne in mind, however, that we have a considerable amount of experience and data for other jurisdictions available on the operation of the twelve person jury. In particular, the experience of other jurisdictions with the operation of qualified majority verdicts is based upon a jury of twelve members. We do not know whether applying qualified majority rules in the context of a jury of fifteen members would have significantly different consequences to that experienced in (for example) England and Wales. If Scots law were to adopt a qualified majority rule consistent with international practice in this area, there would therefore be a considerable attraction in aligning the size of our jury with these other systems, rather than needlessly to embark on an experiment as to how qualified majority rules work in the context of a fifteen person jury.


\textsuperscript{109} See e.g. A B Kao and I D Couzin, “Decision accuracy in complex environments is often maximised by small group sizes” (2014) 281 Proceedings of the Royal Society B 2013305.

\textsuperscript{110} I D Steiner, \textit{Group Process and Productivity} (1971) 101.

\textsuperscript{111} G C Homans, \textit{The Human Group} (1950) 103 (“It is significant how often a group of between eight and a dozen persons crops up under the supervision of a single leader in organizations of many different kinds.”); see also Steiner, \textit{Group Process and Productivity} (n 110) 102.

\textsuperscript{112} G A Theodorson, “Elements in the progressive development of small groups” (1953) 31 Social Forces 311.
It will be noted that the Thomson Committee proposed that the Scottish jury be reduced in size to twelve members, while the *Modern Scottish Jury in Criminal Trials* consultation exercise revealed that consultees were almost evenly split on whether the Scottish jury should be reduced from fifteen members, with at least some of those who favoured retention of a fifteen person jury appearing to hold this view on the basis that it would be wrong to reduce the jury’s size without at the same time considering the issue of majority verdicts. Despite the longstanding practice of Scottish juries consisting of fifteen members, this does not appear to be seen as a crucial feature of the system, nor one which is worth retaining in and of itself.

13.8 The not proven verdict: why does Scots law have three verdicts in criminal trials?

Scots law, uniquely, has two verdicts of acquittal – not guilty and not proven. Both have the same effect in law, and the standard text on Scottish criminal procedure contains the following remarkable statement:

> The jury should not be told the meaning of the not proven verdict; they need not even be told that it is a verdict of acquittal.

Why does Scots law operate this unique system? As Gerry Maher has explained:

> ...the historical origins of the verdict are to be found in a period in the history of Scottish criminal procedure when juries did not return (or were not trusted to return) general verdicts of guilty and not guilty, but instead were asked whether they found facts or whole series of facts libelled in indictments proven or not proven. The verdict of not proven was simply one type of special, rather than general, verdict and its retention once juries had readopted the practice of giving general verdicts was mainly a matter of historical accident.

The fact that Scots law has developed three verdicts largely by accident does not mean that such a system is devoid of benefit. Over time, Scottish courts and commentators have periodically sought to construct a rationale for the not proven verdict. Hume suggested that juries might use the not proven verdict “to mark a deficiency only of lawful evidence to convict” the accused and not guilty “to convey the jury’s opinion of his innocence of the charge”. In more recent times, this has been directly linked to the corroboration requirement, and it has been suggested that not proven is appropriate and likely to be used for cases where corroboration is absent. That rationalisation, however, is less plausible now that such cases should be prevented from reaching the jury by a

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113 See ch 13.2.
114 See Nicholson, *The Modern Scottish Jury in Criminal Trials: Analysis of Written Consultation Responses* (n 16) 3: “A slight majority (54%) of those who provided a view was in favour of retaining a jury size of 15. A recurring comment was that the issue of jury size should be addressed further by expert reviewers. Many agreed that the issue of jury size could not be considered separately from debate about majority verdicts and acquittal verdicts.”
118 See e.g. T B Smith, *A Short Commentary on the Law of Scotland* (1962) 227 (cases “where in England the accused would probably be convicted”). See also *Criminal Procedure in Scotland (Second Report)* (Cmnd 6218: 1975) para 51.05.
successful no case to answer submission. In theory, juries could reserve the verdict for cases where there was a legal sufficiency of evidence but they did not accept the evidence of a particular witness, but it is utterly implausible to suggest that jurors would consistently adopt this technical rationale without specific judicial direction. Instead, the more likely rationale is that the not proven verdict is particularly appropriate for cases where jurors are in a state of marginal uncertainty, around the threshold of “reasonable doubt”, regarding the guilt of the accused. The existence of the “not proven” verdict reinforces the requirement of proof beyond reasonable doubt by emphasising to jurors the possibility of an acquittal in such cases. This was the rationale suggested by Lord Justice-General Clyde in *McNicol v HM Advocate*, and it is supported by recent empirical research to which this report now turns.

**13.9 What effect does the not proven verdict have in practice?**

As a matter of strict logic, the availability of the not proven verdict should have no effect on the rate at which accused persons are convicted or acquitted. Jurors must ask whether the case against the accused has been proven beyond a reasonable doubt; it is only if that question is answered in the negative that they will proceed to the question of which of the two verdicts of acquittal would be appropriate. Theoretically, the fact that two verdicts of acquittal are available to them, rather than merely “not guilty”, should not affect whether they choose to convict or acquit.

In reality, however, changes to the context in which such decisions are taken may affect the decision reached, and so the availability of a third verdict may have significant practical effects. There appears to be only a single research paper which aims to quantify these effects, and so it merits careful consideration. That is a 2008 paper, based on two studies, where Hope and others identified the importance of context and verdict choices to outcome, and carried out two studies which aimed to establish whether and how the availability of the not proven verdict affected the conclusions reached by simulated juries (comprised of Scottish undergraduate students in study 1, and of local volunteers from the Aberdeen area in study 2).

In Study 1, the mock jurors were provided with a summary of a sexual assault trial and jury directions based on those used in actual cases. The jurors were randomly assigned to consider the case on the basis either of two or three verdicts, reflected in the directions which they were provided. The jurors considered the case individually rather than deliberating. The acquittal rate was higher where three verdicts rather than two were available (49 per cent rather than 39 per cent), although the difference was not statistically significant. 35 per cent of the jurors who had considered the case on the basis of three verdicts believed that a not proven verdict permitted the retrial of the accused at a later date, despite the written directions which had been provided to them expressly stating that this was not the case.

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119 1964 JC 25 at 27.
120 A similar argument was put to the jury by the trial judge (Lord Cameron) in *McNicol v HM Advocate* 1964 JC 25, and strongly criticised by the appeal court.
122 This is an important difference from the practical operation of the jury system which limits the use which can be made of the results (cf ch 9.2), but “Study 2”, noted immediately below, was not conducted on this basis.
In Study 2, the mock jurors were provided with a summary of a (non-sexual) assault trial and jury directions, again based on those used in actual cases. Three different versions of the trial summary, with the strength of the prosecution evidence varying (strong, moderate or weak) were used, while jurors were again randomly assigned to consider the case on the basis of either two or three verdicts. In combination, this meant that there were a possible six conditions under which the mock jurors could participate. Jurors considered the cases in groups of four to eight members, and were asked to reach a unanimous verdict if possible, and to record the verdict of the majority if not. There were fourteen juries who considered the case with reference to two possible verdicts, and another fourteen who considered the case with reference to three possible verdicts.

Overall (including all variations as to the strength of the evidence presented), the conviction rate in Study 2 was higher where two verdicts rather than three were available (35 per cent rather than 22 per cent), a difference which was marginally statistically significant. Further analysis indicated that there was an association between the verdict options available and the outcomes reached only where the “moderate” version of the case was presented. 37 per cent of the jurors who had considered the case on the basis of three verdicts believed that a not proven verdict permitted the retrial of the accused at a later date, again despite the written instructions which they had received. The researchers suggested that the availability of a third verdict reduced the likelihood of a hung jury, with 50% of two-verdict juries reaching unanimous decisions against 71 per cent of three-verdict juries.\textsuperscript{123}

For present purposes, a number of tentative conclusions may be drawn from this work:

- Jurors do not use the “not proven” verdict in the manner which the structure of the three verdicts available to Scottish jurors suggests that they, in theory, should.
- The not proven verdict may help to prevent wrongful convictions, because it was in the cases of “moderately strong” evidence – those where most caution would seem to be required – that it appeared to be particularly attractive to jurors.\textsuperscript{124}
- The extent to which jurors wrongly believe that a not proven verdict permits a subsequent retrial, despite having received direct instructions to the contrary, is particularly concerning.
- The not proven verdict may inhibit thorough deliberation by jurors; the authors noted in Study 2 how deliberations appeared to “dry-up” once the possibility of a not proven verdict was raised.

The possibility of public misconception about the consequences of a not proven verdict had previously been raised by a BBC opinion poll, commissioned to accompany a 1993 documentary, which had found that 48 per cent of those questioned believed that such a verdict permitted a later retrial if fresh evidence emerged.\textsuperscript{125} The findings of the research by Hope and others, however, are

\textsuperscript{123} However, it should be remembered that the number of juries was small, and that the size of the juries varied from four to eight (no detail of the pattern of variation is provided). The percentage figures offered by the researchers indicate that seven of fourteen two-verdict juries were unanimous as compared to ten of fourteen three-verdict juries; such a difference might be a chance occurrence and/or a consequence of variation in jury size.

\textsuperscript{124} Hope and others (n 121) at 250 put this point differently, suggesting that “it could be argued that a Not Proven verdict actually promotes more accurate juror decisions”. This seems, however, to go further than the evidence permits: a stronger tendency to acquit rather than convict is not the same thing as increased accuracy.

\textsuperscript{125} See P Duff, “The not proven verdict: jury mythology and ‘moral panics’” 1996 JR 1 at 9.
rather more concerning given that they suggest this misconception to be prevalent even amongst those who have received direct instruction on the verdict’s consequences.

Such a misconception may, however, be less surprising than it might appear at first glance. If a criminal justice system employs two different verdicts of acquittal, it is rational to assume that there is some meaningful difference between them, whether in meaning, effect, or both. The notion that there is no meaningful difference – or, at least, none which can be safely spelt out – is at first sight so irrational that it is plausible that a juror may fail properly to understand a direction to that effect. Despite this, the Jury Manual advises – quite rightly, given the existing case law – that it is “dangerous to attempt to explain any difference between the not proven and not guilty verdicts”, and suggests the following direction on the verdicts available to a Scottish jury:

There are three verdicts you can return, not guilty, or not proven, or guilty. Not guilty and not proven have the same effect, acquittal. An accused acquitted of a charge can’t be prosecuted again on it.

13.10 Analysis

Based on the discussion above, the following points may be highlighted:

- The simple majority jury verdict is an anomaly out of step with the common law world, difficult to reconcile with the presumption of innocence and the requirement of proof beyond reasonable doubt.
- It has previously been suggested that the simple majority verdict may, exceptionally, be justified because of Scots law’s equally exceptional requirement of corroboration.
- The simple majority verdict may also be viewed as something of a trade-off against the not proven verdict, although the practical consequences of either rule cannot meaningfully be quantified.
- Other common law jury systems have started from the principle that jury verdicts ought to be returned unanimously, but most have qualified this over time to allow a verdict to be returned despite one or (in some cases) two jurors dissenting.
- Such rules have been adopted principally to account for the possibility of one or more “rogue” or intimidated jurors undermining the jury’s function, rather than because of any numerical calculation as to what amounts to proof beyond reasonable doubt.
- Twelve has been accepted as the appropriate size for the jury throughout the common law world, and there is convincing empirical evidence cautioning against any significant reduction in size below this.
- There is an absence of direct evidence as to the quality of decision making by larger juries, although the more general literature on group decision-making might tentatively be taken to suggest that juries of larger than twelve are unlikely to be any better at performing their function than the twelve-person jury, and may even be worse.
- If changes are made to the Scottish jury such as removing the not proven verdict or requiring verdicts by near-unanimity, we can be reasonably confident as to how such rules would


127 Para 18.2.
operate in the context of a twelve-person jury given experience elsewhere, but we have no evidence as to how such rules would operate in the context of a fifteen-person jury. This may itself be a persuasive reason for adopting the twelve-person jury if other changes are made.

- The not proven verdict offers a degree of protection against wrongful conviction by rendering juries less likely to convict in marginal cases.
- It does so, however, at a cost: jurors may misunderstand the consequences of the verdict, its availability as a compromise verdict may inhibit deliberation, and it is undesirable in principle to have two different verdicts of acquittal when the difference between them cannot properly be articulated.

The requirement of corroboration, the simple majority verdict, and the three verdict system comprise a package of anomalous features which are closely interlinked. If corroboration is removed, it is difficult to see how the other two can be retained. There appears to be no means of quantifying the effect of any one of these features in isolation, and while we may have a degree of confidence based on experience in the system as it currently stands, there is no clear basis for confidence if one limb of the structure is removed without surgery elsewhere.

If corroboration is to be removed as anomalous, it may be that the not proven verdict should simply disappear at the same time. The question of majority verdicts is a more difficult one, at least in terms of what rule should be introduced. It has long been recognised that simple majority verdicts are difficult to reconcile with the presumption of innocence, and the abolition of corroboration removes the principal defence of the simple majority verdict. It is also clear that there has been significant concern about the introduction of the possibility of a hung jury into Scots law. It is not clear, however, whether it has been appreciated that a qualified majority rule could be expected to result in very few hung juries. Serious consideration should therefore be given to the introduction of a qualified majority rule into Scots law.\(^{128}\)

However, the relative rarity of hung juries is not conclusive. As a matter of principle, it is not clear why symmetrical rules should govern jury verdicts of conviction and acquittal.\(^{129}\) If the state has not succeeded in convincing a qualified majority of the accused's guilt, why should it be entitled to a second attempt? An alternative approach would, therefore, be to regard any failure to reach the qualified majority required for conviction as an acquittal.\(^{130}\)

In light of these proposals, the size of the jury might be reduced to twelve, in line with practice elsewhere. If the simple majority verdict were abolished, there would no longer be any need to maintain a jury comprising of an odd number, while the current size of the Scottish jury, significantly higher than practice elsewhere, places demands on those called to serve, along with financial and

\(^{128}\) As noted in ch 13.2, this chapter uses “qualified majority” to refer to rules requiring near-unanimity, as opposed to the “weighted majority” (of 10:5) suggested in section 70 of the Criminal Justice (Scotland) Bill.

\(^{129}\) See Maher (n 116).

\(^{130}\) A third approach would be to operate asymmetrical rules for conviction and acquittal, but leave room between those options for a failure to reach a verdict: e.g. allow a verdict of not guilty by a simple majority (seven of twelve jurors) and conviction by a qualified majority (ten of twelve jurors), with anything between these options permitting a retrial. This has some superficial attraction, but would mean that, in any case where a jury failed to reach a verdict, it would be a matter of public record that at least half of the jurors believed the accused to be guilty. That is itself difficult to reconcile with the presumption of innocence and would risk unfairness in any retrial.
administrative burdens on the State, which offer no clearly identifiable advantage and may even present some disadvantage given what is known about decision-making in larger groups. Moreover, if the changes canvassed above are made, there is considerable evidence as to their practical effect in the context of a twelve-person jury, but none as to how they would operate in the context of a fifteen-person one.

Finally, if qualified majority verdicts and a reduction in the jury’s size to twelve are proposed, the Review should consider how they should operate in cases where the size of the jury is reduced below twelve over the course of the trial. There is no international consensus on the proper approach here, which might take one of three forms, assuming both a normal requirement of ten out of twelve jurors for a verdict and that the jury may not continue with fewer than ten members:131

(a) The number of potential dissenters remains constant, and a valid verdict is one to which all but two of the jurors agree (i.e. nine of eleven jurors, or eight of ten).

(b) The number required for a verdict remains constant, and so unanimity may be required where the jury has reduced in size (i.e. ten of eleven jurors, or ten of ten).

(c) A hybrid system, whereby complete unanimity is never required (e.g. nine (or ten) of eleven jurors, or nine of ten).

Because the qualified majority system addresses the problem of the potential “rogue” juror, who may well remain in a jury which has been reduced in size, option (b) seems undesirable in principle. Either option (a) or (c) is a valid one, and there is limited reason clearly to prefer one over the other. If Scots law were to rule out the possibility of a hung jury and require acquittal in all cases where the jury reached a verdict, then it might be desirable to avoid setting too high a threshold for a guilty verdict to be returned, suggesting option (a).

13.11 Issues for consideration

It is suggested that the Review should consider whether:

(a) the not proven verdict should be abolished;

(b) the size of the jury should be reduced to twelve members;

(c) the jury should be required to reach a verdict by a qualified majority, which might take one of the following forms:

(i) ten of twelve votes required for a verdict of either guilty or not guilty, with a failure to reach a verdict resulting in a hung jury and the possibility of a retrial;

(ii) ten of twelve votes required for a verdict of guilty, with anything short of this resulting in an acquittal and no possibility of a retrial (unless the provisions of the Double Jeopardy (Scotland) Act 2011 applied).

There may be room for modification of these numbers. In option (ii), consideration could perhaps be given to permitting conviction by nine of twelve jurors, but this

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131 The current Scottish rule is that if the number of jurors drops (from fifteen) below twelve, the trial cannot continue: Criminal Procedure (Scotland) Act 1995 s 90.
might itself be thought difficult to reconcile with the presumption of innocence and proof beyond reasonable doubt.

(d) how any qualified majority rule should operate in the context of a jury which has reduced in size over the course of the trial, with regard to the options set out at 13.10 above.

It is suggested that the Review should invite submissions as to how, if the not proven verdict is to be retained, it should be defined so as to allow for proper direction to be given to juries.
CHAPTER 14: ALTERNATIVE APPROACHES TO EVIDENTIAL SUFFICIENCY, AND RESIDUAL ISSUES

Fraser Davidson

14.1 Introduction
Scots law has been almost unique in modern systems in retaining a general corroboration requirement. While common lawyers sometimes speak loosely of civilian systems requiring corroboration, the group’s enquiries have yielded no sign that this is true as a contemporary fact, apart from the Dutch recognition of the principle of unus testis, nullus testis. Certainly, every system at one point featured elaborate rules indicating the number of witnesses required to prove particular crimes or to convict particular categories of accused. When these fell into desuetude, civilian systems did tend to retain a general corroboration requirement. However, often the existence of a single witness justified the use of torture to secure a confession, thus providing corroboration, a feature which ultimately discredited the requirement. That said, while other systems do not feature a general corroboration requirement, the concept of corroboration is widely known. Thus the starting point for this chapter is to ask what sort of evidence is regarded as corroborative in other systems. The chapter then continues with an examination of whether a corroboration requirement might be retained for specific offences or specific types of evidence. Finally the chapter asks whether, if the requirement for corroboration is abandoned, it may be necessary or desirable to warn juries regarding the danger of convicting an accused person on the basis of uncorroborated evidence, either generally or in certain circumstances, or whether it might be necessary to prohibit judges from issuing warnings in certain circumstances.

14.2 What is corroboration in other systems?
What is meant by corroboration in the first place? In Scots law it is evidence “which strengthens, or confirms, or supports a statement or the testimony of a witness”. Different systems may have other answers to that question, or indeed the same system might have different answers to the question depending on the context it is raised. For example, a particular system may define formal corroboration in one way, but take a more relaxed view as to the sort of evidence to which the jury

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2 See ch 16. See also M Damaška, “Evidentiary barriers to conviction and two models of criminal procedure” (1973) 121 U Penn LR 507 at 530.
3 This principle is discussed in detail in ch 18. While the Review will wish to consider carefully what lessons may be learned from the Dutch rule, it should be noted that the authors of the report on this rule observe (at ch 18.10) that “it is quite hard to grasp what the Dutch rule exactly entails”: the rule does not provide an “off the shelf” alternative which Scotland might consider adopting in place of the corroboration rule.
7 Fox v HM Advocate 1998 JC 94 at 99 per Lord Justice-General Rodger. For further discussion of the existing law of corroboration in Scots law, see ch 3.
might look in support of the prosecution case where a corroboration warning (discussed below) is
given. The classic definition of corroboration in English law is that of Lord Reading CJ in *R v
Baskerville*:8

...evidence in corroboration must be independent testimony which affects the accused by
connecting or tending to connect him with the crime... it must be evidence which implicates
him, that is, which confirms in some material particulars not only the evidence that the
crime has been committed, but that the prisoner committed it.

Yet it is clear that the jury is not confined to looking for such evidence when they are given a
corroboration warning.9 Equally while Irish law accepts the *Baskerville* definition of corroboration,10
it has been judicially recognised that potentially corroborative evidence in the context of a
corroboration warning is considerably broader.11

Lord Reading was keen in *Baskerville* to define corroboration in the way that he did in order to make
it clear that an alternative view of corroboration, which indicated that it could be found in any fact
which tended to support the testimony of a prosecution witness, was not sound.12 Yet the approach
taken in *Baskerville* was explicitly rejected by the Supreme Court of Canada in *R v Vetrovec*,13 where
Dickson J opined:14

The reason for requiring corroboration is that we believe that the witness has good reason
to lie. We therefore want some other piece of evidence which tends to convince us that he is
telling the truth. Evidence which implicates the accused does indeed serve this purpose, but
it cannot be said that it is the only sort of evidence which will accredit the [witness].

Other systems take a similar view of what corroboration is.15 Thus Cloete JA opines in *S v Gentle*16
that “by corroboration is meant other evidence which supports the evidence of the complainant,
and which renders the evidence of the accused less probable”.17

What types of evidence can corroborate then? Several categories are considered below.

*Reiteration of confession.* As will be seen below, the fact that an accused reiterates a confession can
amount to corroboration in South Africa. In Scots law the repetition of a confession cannot currently

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8 [1916] 2 KB 658 at 667. The court was considering the issue in the context of the practice at the time to warn
juries of the danger involved in convicting a defendant on the basis of the uncorroborated evidence of an
accomplice: see *Baskerville* at 663. No formal requirement for corroboration of the evidence of accomplices
has ever existed in English law.

9 See P Lewis, “A comparative examination of corroboration warnings in prosecutions of sexual offences”

10 See *DPP v Gilligan* [2006] 1 IR 107.

11 See Kearns J in *People v Meehan* [2006] 3 IR 468 at 493.

12 Such a view emerged from older cases such as *R v Birkett and Brady* (1813) 168 ER 787; but had recently
been repeated in *R v Wills* [1916] 1 KB 933 at 937. It may be pointed out that in practice the *Baskerville* view of
what corroboration is has not always been adhered to – see e.g. *R v McInnes* (1990) 90 Cr App R 99. See also S


14 At 826. And in *R v Kehler* 2004 SCC 11 the Supreme Court said (at para 17) that “to be considered
confirmatory, independent evidence does not have to implicate the accused”.


16 2005 1 SACR 420.

17 At para 18.
amount to corroboration, but with the abolition of the corroboration requirement juries looking for supporting evidence might be invited to consider such evidence.

**Distress of complainer.** In England and Wales, South Africa and several Commonwealth jurisdictions, a complainer’s observed state of distress may corroborate her or his story. Corroboration by distress is of course known in Scotland, but it may operate on a narrower basis than in certain of the other jurisdictions. Thus in *Smith v Lees*, Lord Justice-General Rodger stated:

> In order to corroborate eyewitness evidence on a crucial fact, the corroborating evidence must support or confirm that evidence by tending to show that what the eyewitness said happened did actually happen. So if a complainer says that she did not consent to intercourse but was forced to submit, then evidence of her distress will tend to confirm her evidence, since a jury will be entitled to infer that the complainer was distressed because she was forced to submit to intercourse and did not agree to it. But in a case [of lewd and licentious practices] evidence of distress cannot support or confirm the complainer’s evidence that a particular form of sexual activity occurred because there is no basis on which the jury can use the evidence of distress to draw the necessary inference that it did.

By contrast in *R v Vetrovec*, Dickson J in the Supreme Court of Canada pointed out that, in the earlier case of *Murphy and Butt v R*, a complainant’s distress was not only evidence against M, who admitted intercourse, but against B, who denied it. The distress did not directly implicate B, but it was enough that it made the complainant’s story more credible. A somewhat wider role for distress as corroborative/supporting evidence might therefore be possible.

**Previous statements of complainer.** The view of Scots law is that previous statements made by a complainer are only admissible in specific circumstances. Thus Lord Justice-Clerk Aitchison stated in *Morton v HM Advocate*:

> A statement made by an injured party *de recenti*... is ordinarily inadmissible as hearsay, but an exception is allowed in the case of sexual assaults on women and children. In such cases the court will allow evidence of statements made by an injured party *de recenti*, for the limited purpose of showing that the conduct of the injured party has been consistent and that the story is not an afterthought. But it must be clearly affirmed that the evidence is admissible as bearing on credibility only, and the statements of an injured party although made *de recenti* do not amount to corroboration.

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18 See e.g. *Bainbridge v Scott* 1988 SLT 871. This may be qualified by the view taken in *Campbell v HM Advocate* 1998 JC 130, where Lord Justice-Clerk Cullen opined (at 137): “Evidence of an accused giving an instruction, making a promise, or expressing his thanks in circumstances directly related to a past crime should be regarded as incriminating conduct rather than an admission of past conduct. . . . [This] evidence provided a separate source of evidence against Campbell in addition to the statement.”


20 1997 JC 73.

21 At 90.


23 [1977] 70 DLR (3d) 42.

24 1938 JC 50 at 53. In *HM Advocate v Small* 2014 SLT (Sh Ct) 49; this passage was treated as *obiter*. The sheriff noted that *de recenti* evidence had previously been admitted in a murder case (*HM Advocate v Stewart* (1855) 2 Irv 166) and a divorce case (*Martin v Martin* (1954) 70 Sh Ct Rep 306). Thus, despite the decision in *Morton* being made by a Full Bench, he felt able to admit a *de recenti* statement in a robbery trial.
The key point then is that even when the evidence is admissible, it cannot corroborate. The rule in question is obviously subject to the criticism that it is based on the archaic view that the testimony of women and children is inherently suspect, and so merits a special credibility exception.\(^{25}\) In England, while a similar exception was once recognised,\(^{26}\) it was equally understood that such evidence could not be corroborative.\(^{27}\) The current English position is represented by section 120(7) of the Criminal Justice Act 2003, which renders admissible evidence of any past complaint of any offence.\(^{28}\) That provision does not make any reference to corroboration. However, interestingly enough, the Singapore Evidence Act section 159 provides:

In order to corroborate the testimony of any witness, any former statement made by such witness ... relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.

**Lies told by the accused.** If a previous consistent statement may amount to corroboration in at least one system, what of a previous inconsistent statement? In other words, can the fact that an accused person has lied amount to corroboration? The classic position of Scots law is represented by the statement of Lord Justice-General Normand in *Wilkie v HM Advocate*:\(^{29}\)

> It would be a great misfortune if we were to give any support to the idea that corroboration by false contradiction has any place in our criminal law. There are many reasons, unfortunately, which induce people to conceal the truth or to tell falsehoods, and it cannot be presumed that the sole reason why an accused person has failed to tell the truth, or has told a lie, is a desire to conceal his guilt...

That this is the position still taken by Scots law is confirmed by Lord Coulsfield’s statement in *Brown v HM Advocate*\(^{30}\) that the “general rule undoubtedly is that false evidence should be discarded by a jury and that the Crown has to prove the case by acceptable evidence”.\(^{31}\) That being said, cases exist

\(^{25}\) See F Raitt, “Gender bias in the hearsay rule”, in S Childs and L Ellison (eds) *Feminist Perspectives on Evidence* (2000) 59 and L McRirmon, “Consistent statements of a witness” (1987) 17 Osgoode Hall LJ 285. The similar common law rule was described by Holmes J in *Commonwealth v Cleary* 172 Mass 175 (1898) as “a perverted survival of the ancient requirement that a woman should make hue and cry as a preliminary to an appeal of rape”. See also Eichelbaum J in *R v H* [1997] 1 NZLR 673 at 697. And on the fallacy that genuine victims will not delay in making a complaint see Australian Law Reform Commission, *Uniform Evidence Law* (ALRC Report No 102, 2005) paras 18.72-18.73. Legislation in several Australian states sought to oblige judges to warn juries that delay in making complaint does not mean that the complaint is false – see e.g. s 61(1)(b) of the Victorian Crimes Act 1958 – but *Crofts v The Queen* (1996) 186 CLR 427 at 448 indicated that delay could still be taken into account in assessing the complainant’s credibility, so that further legislative intervention was required (summarised in Australian Law Reform Commission, *Family Violence – A National Legal Response* (ALRC Report 114, 2010) paras 28.68-28.82). The impact of that intervention appears to have been limited – see e.g. *R v Vello* [2008] VSCA 28; Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004) para 7.88.

\(^{26}\) See Ridley J in *R v Osborne* [1905] 1 KB 551 at 556.

\(^{27}\) Holmes J stated in *R v Coll* (1889) 25 LR 522 at 541: “It is I think clear that the evidence of a witness cannot be corroborated by proving statements to the same effect previously made by him.” Those views were endorsed by *R v Beattie* (1889) 89 Cr App Rep 302. A similar position is taken in other systems: see *Kilby v R* (1973) 1 ALR 283; *S v Scott-Crossley* 2008 1 SACR 223 at para 17.


\(^{29}\) 1938 JC 128 at 132.

\(^{30}\) 2003 SLT 2.

\(^{31}\) At para 8.
which seem to represent a qualification to the above view. Thus, in *Nisbet v HM Advocate*, an accused having been identified as the thief by an individual who had reset stolen goods, corroboration was found in his “awkward” story about how he had acquired them. In *Winter v Heywood*, W was identified as the driver of a car involved in an accident. As he was its registered keeper, he was obliged by statute to state who was driving at the time of the accident. When asked to do so, he falsely indicated that it was another individual. This was held to amount to potential corroboration. The same view was taken of an accused’s attempt to set up no fewer than three false alibis in *Bovill v HM Advocate*. Yet in both the latter two cases the court was at pains to stress the unusual nature of the circumstances and to reiterate the soundness of the general principle. So Lord Justice-General Hope in *Winter* said that it was not a case of corroboration by contradiction or false denial, while Lord Kirkwood opined in *Bovill* that:

the Crown’s reliance on the evidence relating to the false alibis does not involve corroboration by false contradiction, a concept that has long been discredited in the field of criminal law.

Nonetheless, such evidence is more readily accepted as corroborative in England and other common law jurisdictions. In *R v Lucas* the Court of Appeal opined:

To be capable of amounting to corroboration the lie told out of court must first of all be deliberate. Secondly it must relate to a material issue. Thirdly the motive for the lie must be a realisation of guilt and a fear of the truth. The jury should in appropriate cases be reminded that people sometimes lie, for example, in an attempt to bolster up a just cause, or out of shame or out of a wish to conceal disgraceful behaviour from their family. Fourthly the statement must be clearly shown to be a lie by evidence other than that of the accomplice who is to be corroborated, that is to say by admission or by evidence from an independent witness.

As a matter of good sense it is difficult to see why, subject to the same safeguards, lies proved to have been told in court by a defendant should not equally be capable of providing corroboration.

**Conclusion**

The conclusion to be drawn from this section, then, is that while Scots law embraces a fairly wide concept of corroborative evidence, other systems treat certain types of evidence as corroborative, which would not be so regarded in Scotland. Consideration could be given to these examples if it

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33 1995 JC 60.
34 2003 SLT 930.
35 At 62.
36 At para 25.
38 At 724-725.
39 Such as falsely denying an association with the victim as in *Credland v Knowler* (1951) 35 Cr App R 48; or insisting he was not in the vicinity when the offence was committed, as in *R v Goodway* [1993] 4 All ER 894. See also *R v Tripodi* (1961) 104 CLR 1 at 9.
were thought necessary to enumerate categories of supporting evidence in the absence of a corroboration requirement.\textsuperscript{40}

### 14.3 Residual corroboration requirements

Although Scots law stands out in retaining a general corroboration requirement, certain systems do insist on corroboration in relation to particular crimes. In England section 13 of the Perjury Act 1911 provides that a person may not be convicted of perjury solely upon the evidence of one witness as to the falsity of any statement alleged to be false, and section 43 of the Hong Kong Crimes Ordinance speaks in almost identical terms of perjury and subornation of perjury. Several US states have similar provisions,\textsuperscript{41} while section 121(1) of the New Zealand Evidence Act 2006 indicates that corroboration is not required except for the offences of perjury, false oaths, false statements or declarations and treason.\textsuperscript{42} Equally, section 133 of the Criminal Code of Canada indicates that no person can be convicted of perjury on the evidence of a single witness, unless the evidence of that witness is corroborated in a material particular by evidence that implicates the accused, while section 47(3) deals in a similar way with treason.\textsuperscript{43} Article III of the US Constitution demands two witnesses to treason,\textsuperscript{44} and that used to be the position taken in England by section 1 of the Treason Act 1795 in relation to a particular form of treason until its repeal by schedule 10 of the Crime and Disorder Act 1998. It would seem that all these systems take or used to take such a position because of their common law roots.

As to why corroboration is required in these instances, Tapper\textsuperscript{45} locates the roots of the perjury rule in the fact that “perjury was originally punished by the Star Chamber”,\textsuperscript{46} a court whose procedure was influenced by civil law, which of course traditionally demanded corroboration. It was justified by Parker CJ, in\textit{R v Muscot},\textsuperscript{47} on the basis that “else there is only oath against oath”,\textsuperscript{48} but that could be said to be true of any offence. Tapper suggests that the modern justification is that witnesses should not be discouraged from testifying, which would apparently be a risk if they could be convicted of perjury on the evidence of a single witness. The New Zealand Evidence Law Reform Committee supported this view,\textsuperscript{49} but others are unconvinced, doubting whether potential witnesses are even aware of the corroboration requirement.\textsuperscript{50} As regards treason, the Committee found potential justification in the fact that, at the time it reported, the offence still attracted the death penalty.\textsuperscript{51}

\textsuperscript{40} As has been suggested here in relation to confessions (ch 6) and hearsay (ch 8).
\textsuperscript{41} See Barzun (n 5) at 1964.
\textsuperscript{42} In terms of ss 108, 110, 111 and 73 of the Crimes Act 1961 (NZ), respectively.
\textsuperscript{43} A similar approach is taken to the offence of procuring feigned marriage under s 292(2).
\textsuperscript{44} This is also a federal rule – \textit{Weller v US}, 323 US 606 (1945). Section 6 of the Singapore Sedition Act also demands corroboration, while s 12 of the Hong Kong Crimes Ordinance also prevents a conviction for sedition on the uncorroborated testimony of one witness.
\textsuperscript{45} C Tapper, \textit{Cross and Tapper on Evidence}, 12\textsuperscript{th} edn (2010).
\textsuperscript{46} At 261.
\textsuperscript{47} (1713) 10 Mod 192.
\textsuperscript{48} At 195.
\textsuperscript{49} In its Report on \textit{Corroboration} (1984) para 31. See also Criminal Law Revision Committee, \textit{Evidence} (n 28) paras 190-192.
\textsuperscript{51} New Zealand Evidence Law Reform Committee, \textit{Corroboration} (n 49) para 39.
This would not be a justification in Scots law, and could not have been the original justification, given
the range of offences which at one time attracted the death penalty. Additionally, the Committee
considered that justification might be found in the fact that the government not merely prosecuted
the offence, but is also “a party with a direct interest of its own to serve”.\textsuperscript{52} This seems a rather
flimsy justification.\textsuperscript{53}

Particular sorts of corroboration requirement appear in UK statutes which apply in Scotland, and will
continue to apply following the repeal of the general corroboration requirement. Thus section 89(2)
of the Road Traffic Regulation Act 1984 provides that a person may not be convicted of speeding
solely upon the opinion of one witness that he or she was driving at a speed exceeding a specified
limit. Another example would have been section 168(5) of the Representation of the People Act
1983, under which a person could not be convicted of personation except on the evidence of two
witnesses, but for the repeal of the provision by the Representation of the People Act 1985. There
appears to be no single factor unifying these examples and no particular lesson for Scots law other
than to note that any such statutory examples will remain even after the general requirement for
corroboration has been removed.

14.4 Corroboration requirements for particular types of evidence

There is then a question of whether corroboration is – or should be – required for particular forms of
evidence. Previous chapters of this report have already addressed this issue with regard to
eyewitness identification evidence,\textsuperscript{54} confession evidence,\textsuperscript{55} the evidence of accomplices and
informers\textsuperscript{56} and hearsay evidence.\textsuperscript{57} One type of evidence that has not been considered thus far is
forensic evidence. This section considers this and also a further issue: that of so-called “credibility
contests”.

Forensic evidence

Certain academics\textsuperscript{58} have suggested that that a conviction should rarely if ever be able to rest solely
on certain forms of forensic evidence. There are three significant issues which might be claimed to
arise with forensic evidence, depending on the particular evidence in issue. First, that juries do not
properly understand it, and especially the probability issues it generates. Secondly, that because

\textsuperscript{52} Para 42. J H Wigmore, \textit{A Treatise on the Anglo-American System of Evidence in Trials at Common Law}, 3\textsuperscript{rd}
edn (1940) observed that “in times of bitter political division, the dominant political party has the strongest
motive and the ampest means of securing fake testimony to rid itself of opponents” so “[t]he rule of two
witnesses seems to rest on justifiable grounds of policy” (para 2037).
\textsuperscript{53} The Canadian Law Reform Commission, \textit{Evidence: Corroboration Study Paper} (1975) noted (at 17) that “if the
government is ever as bent on convicting a person of treason as Wigmore hypothesised, the corroboration
requirement will be of no protection to the accused”. See also Criminal Law Revision Committee, \textit{Evidence} (n
28) para 195.
\textsuperscript{54} See ch 5.
\textsuperscript{55} See ch 6.
\textsuperscript{56} See ch 7.
\textsuperscript{57} See ch 8.
\textsuperscript{58} See e.g. A Ligertwood, “Can DNA evidence alone convict an accused?” (2011) 33 Sydney LR 487; A Roth,
“Safety in numbers: deciding when DNA alone is enough to convict” (2010) 85 NYU LR 1130.
such evidence is “scientific” juries attribute too much weight to it. Thirdly, and most importantly, that the scientific basis for certain evidence is highly suspect.

For example, although juries tend to be particularly impressed by DNA evidence, they rarely understand how catastrophic errors can occur as a result of irregularities in the collection, processing, or interpretation of such evidence. One of the reasons they tend to be impressed is that DNA evidence is often expressed in terms of spectacular probability ratios of over 99 per cent, or in terms of one in several million individuals having a particular DNA profile, which tend to confuse juries as to the actual probability of a match. Very often the real likelihood that a suspect is the source of a match is much nearer 90 per cent than 100 per cent. It is also pointed out that, although DNA evidence is presented in terms of scientific probability, the DNA testing process is not carried out in a purely scientific way but as part of the investigatory process, a factor which tends to affect probabilities in a way which is not properly communicated to fact finders. Similarly, there is a tendency for the authorities to stop investigating other possible suspects once a DNA match is found, which once more influences probability rates. Yet individuals have been convicted in a number of jurisdictions entirely on the basis of DNA evidence, sometimes even when there was contradictory evidence.

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59 See Ligertwood (n 58).
62 A probability match of one in a quintillion was suggested in State v Abdelmalik 273 SW 3d 61 (2008).
The Law Commission report

There is also a more fundamental concern regarding the reliability of much scientific evidence. The seriousness of this concern is shown in the fact that, in England and Wales, the Law Commission has produced a report on the issue, *Expert Evidence in Criminal Proceedings in England and Wales*, together with a draft Bill – the Criminal Evidence (Experts) Bill – which would create a detailed statutory framework, with a view to making the reliability of scientific evidence a threshold for its admissibility. The Law Commission also recommends that Crown Court judges should be given a formal power to appoint an “independent expert in exceptional cases” where this might assist the court with the issue of reliability. Moreover a ruling “under the reliability test should be approached by the appellate court as the exercise of a legal judgment rather than the exercise of a judicial discretion”. Training would also be supplied to “help the judiciary apply our proposed reliability test”. The motivation for this proposed dramatic reform is the belief that in criminal cases “expert opinion evidence of doubtful reliability” is being placed before the jury, too readily. It has even been suggested that there may be a “culture of acceptance” in relation to evidence of a scientific nature on the part of some trial judges.

It should of course be pointed out that while the government shared the Law Commission’s concern, because there was “no robust estimate of the size of the problem to be tackled”, and because the reforms would create additional costs, “but without sufficient reliably predictable savings to compensate for those costs”, it decided that it was not feasible to implement the proposals in full. Rather than creating a statutory reliability test at this time, the Government will invite the Criminal Procedure Rules Committee to consider amending the Criminal Procedure Rules to ensure that judges are provided at the initial stage with more information about the expert evidence it is proposed to adduce.

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69 Law Com No 325, 2011.
70 Para 6.1.
72 Law Commission, *Expert Evidence* (n 69) para 5.94.
73 Para 3.43.
74 Para 1.17.
75 Ibid. Some commentators claim that judges have accepted the reliability of branches of scientific evidence when the scientific community has not – see S Cole, “Grandfathering evidence: fingerprint admissibility rulings” (2004) 41 American Crim LR 1189; G Edmond, “Judging the scientific and medical literature” (2008) 28 OJLS 523; K Findley, “Judicial gatekeeping of suspect evidence” (2012-2013) 47 Georgia LR 723.
77 Para 4. The Criminal Procedure Rules 2014, SI 2014/1610, coming into effect on 6 October 2014, accordingly contain an amended Part 33 (Expert evidence). This stresses that the expert’s duty is to the court, rather than to the party for whom s/he appears (rule 33.2). A procedure is introduced for introducing a summary of the expert’s conclusions, and to require service of information detrimental to an expert’s credibility (rule 33.3). An expert’s report must now include information relevant to assessing the reliability of her/his opinion (rule 33.4). The thrust of the changes is to clarify what information the court must have in order to make an informed decision about the reliability of an expert’s opinion, having regards, where necessary to the expert’s credibility. Where the expert evidence is unlikely to be in dispute, it can now be submitted in summary form, a full report only being required if the conclusions are contested. The Committee also asked the Lord Chief Justice to amend the Criminal Practice Directions which supplement Part 33 in order to include indicia of reliability and give the courts guidance on how to apply them. Part 33A has accordingly been added – see [2014] EWCA Crim
Reliability in English law

Of course, the fact that the government is not immediately to implement the Law Commission’s recommendations does not mean that there is not a problem, and the government’s response seems to acknowledge that the problem is real. Nonetheless, to what extent is it true that the current approach to expert evidence does not sufficiently focus on reliability? As regards the law of England, in *R v Luttrell* the Court of Appeal noted that:

For expert evidence to be admissible, two conditions must be satisfied: first, that study or experience will give a witness’s opinion an authority which the opinion of one not so qualified will lack; and secondly the witness must be so qualified to express the opinion. The first was elucidated in *R v Bonython*, where King CJ said that the question “may be divided into two parts: (a) whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area, and (b) whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the witness would render his opinion of assistance to the court”.

There is thus some reference to reliability, and as the court went on to note:

In some cases, the reliability of the evidence might be relevant to whether the conditions of admissibility are satisfied. Thus in *R v Gilfoyle*, it was observed that English law will not consider expert evidence properly admissible if it is “based on a developing new brand of science or medicine … until it is accepted by the scientific community as being able to provide accurate and reliable opinion”.

Yet it continued:

However, while reliability of evidence can be relevant to whether the conditions of admissibility are met, in itself reliability goes to its weight.

1569. Moreover, the Advocacy Training Council is in the course of preparing a “tool kit” for advocates to use when considering expert evidence and its admissibility, which is itself based upon the recommendations in the Law Commission’s report.


79 At para 32 (citations omitted).

80 At para 35 (citations omitted).

81 At para 36.

Here it cited Lord President Cooper in *Davie v Magistrates of Edinburgh.*

Thus it is probably true that in England the test for the admissibility of forensic evidence does not (or at least did not) focus overmuch on reliability.

**Types of suspect evidence**

The sort of evidence the Law Commission had in mind is that relating to new branches of forensic science such as voice comparison, facial mapping, ear prints, and lip reading. However, there is an argument that quite a number of more established areas of forensic science are also suspect. The US National Academy of Sciences, in *Strengthening Forensic Science in the United States: A Path Forward,* stated that:

> With the exception of nuclear DNA analysis, however, no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source.

It continued:

> The law’s greatest dilemma in its heavy reliance on forensic evidence, however, concerns the question of whether – and to what extent – there is science in any given forensic science discipline.

An Australian commentator observes that:

> Many forensic sciences concerned with identification, particularly those involving comparisons and pattern matching (for example, latent fingerprints, toolmarks,

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82 1953 SC 34 at 40.
83 See now *R v Dlugosz* [2013] EWCA Crim 2 at para 11.
84 Interestingly, the Canadian courts have recently been laying greater stress on ensuring the reliability of forensic evidence. Thus Binnie J observes in *R v J-LJ* [2000] 2 SCR 600 at para 28 that “[t]he admissibility of expert evidence should be scrutinised at the time it is proffered, and not allowed too easy an entry on the basis that all of the frailties could go at the end of the day to weight rather than admissibility”. And Deschamps J insists in *R v Trochym* [2007] 1 SCR 239 at para 27 reliability is “an essential component of admissibility”. See also G Edmond and K Roach, “A contextual approach to the admissibility of the state’s forensic science and expert evidence” (2011) 61 U of Toronto LJ 343.
87 See *R v Dallagher* [2002] EWCA Crim 1903.
handwriting, hair and fibres, foot and shoe prints, voice and image comparisons and bite marks) had their scientific underpinnings and general reliability authoritatively questioned.

And US academics state:

No basis exists in either theory or data for the core contention that every distinct object leaves its own unique set of markers that can be identified by a skilled forensic scientist.

Challenging scientific evidence

Of course, the point might be made that in an adversarial system scientific evidence is open to challenge. However, the Law Commission suggests that cross-examination is “an insufficient safeguard against unreliability”. In its preceding Consultation Paper, it observed that:

...the non-specialist individuals involved in the criminal trial process may have an insufficient understanding of the limitations of expert evidence, scientific evidence in particular. They may assume that because an expert’s evidence is presented as “scientific” it may be taken to be reliable. Certainly there is evidence to suggest that juries may find it difficult to understand or follow cross-examination aimed at revealing flaws in scientific methodology, a problem which is more likely to be acute if the evidence is complex. Specific concerns have been raised about the effectiveness of calling expert witnesses to contradict evidence given by the opposing expert and the ability or willingness of trial advocates to address methodological flaws in cross-examination before jurors. It is often said moreover, that on

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93 Law Commission, Expert Evidence (n 69) para 3.4.


97 Citing J Sanders, “The merits of paternalistic justification for restrictions on the admissibility of expert evidence” (2003) 33 Seton Hall LR 881 and Forensic Science on Trial, the 7th Report of the House of Commons Science and Technology Committee HC 96-1 (2004-2005) 63-64, as well as the statement of Henderson J in R v Murrin (1999) 181 DLR (4th) 320 at 333 that the “fact that the experts usually have impressive academic credentials and extensive experience may also serve to lend an air of mystic infallibility to the evidence”. It also notes that M Redmayne, Expert Evidence and Criminal Justice (2001) summarises research which suggests that as expert evidence becomes more complicated jurors shift their focus and rely on peripheral indicia of reliability such as the expert’s qualifications or demeanour (110).


account of its “aura of infallibility” scientific evidence has a particularly persuasive effect on jurors.\textsuperscript{100}

Similarly, one commentator argues that:\textsuperscript{101}

There are several reasons why cross-examination and “defence” witnesses do not seem to overcome the impact of incriminating expert opinion evidence of unknown probative value.\textsuperscript{102} First, the “prosecution” expert’s opinions are often tightly woven into a comprehensive narrative or story.\textsuperscript{103} Expert opinion, however (un)reliable, may be considered persuasive and even compelling where other evidence appears to support it. Secondly, prosecution witnesses are often represented as disinterested (i.e. impartial or neutral) forensic scientists or consultants, whereas defence witnesses – almost never state employees – are more likely to be portrayed as interested and forensically inexperienced.\textsuperscript{104}

Thirdly, on many occasions witnesses appearing for the defence will offer mere methodological (or theoretical) critique. This may be from methodologically sophisticated individuals who are highly sceptical of the approach and conclusions, but will generally not have undertaken their own studies or analysis of the “evidence”. Fourthly, on many occasions there will be relatively limited evidence called by the defence, and a much more constrained defence narrative.\textsuperscript{105} In many trials, in response to the more elaborate and integrated prosecution narrative, the defendant may only adduce rebuttal expert evidence. The defence thereby relies on the tribunal of fact and its ability to appreciate often subtle and complicated methodological and statistical conceits. Finally, a large part of the cross-examination of experts tends to be superficial: restricted to credibility and the chain of custody rather than more fundamental methodological and statistical issues. This probably reflects the abilities of lawyers, the limited resources available to the parties (particularly to

\textsuperscript{100} Citing dicta from \textit{US v Addison} 498 F 2d 741 at 744 and \textit{R v Mohan} [1994] 2 SCR 9 at 21, as well as J Strong, “Language and logic in expert testimony” (1992) 71 Oregon LR 349; C Hutchison and D Ashby, “Redefining the bases for admissibility of expert scientific testimony” (1994) 15 Cardozo LR 1875. However, there are those who reject the claim that juries are unable to comprehend and assess expert testimony – see e.g. E Imwinkelried, “The next step after Daubert” (1994) 15 Cardozo LR 2271. Moreover, a study conducted for the New Zealand Law Commission involving post-trial interviews with actual jurors found that while a number had difficulty understanding expert evidence, that number was typically two or three jurors per trial, and the difficulties were resolved by hearing the evidence of other experts or through discussion - see W Young, N Cameron and Y Tinsley, \textit{Juries in Criminal Trials, Part Two, Volume 2: A Summary of the Research Findings} (NZLRC Preliminary Paper 37, 1999) 25-26.


\textsuperscript{104} See S E Sundby, “The jury as critic: an empirical look at how capital juries perceive expert and lay testimony” (1997) 83 Virginia LR 1109. Some jurors also resented that costs for experts were being incurred by a person whom the juror considered to be guilty, and that these costs would fall to be paid from public funds.

\textsuperscript{105} And see L M Levett and M B Kovera, “The effectiveness of opposing expert witnesses for educating jurors about unreliable expert evidence” (2008) 32 Law and Human Behavior 363.
the defence), and strategic decisions based on impressions of the capabilities and prejudices of juries and judges.

Relevance for corroboration

What do such matters have to do with the subject in hand? It may be remembered that because of the various difficulties associated with scientific evidence, some commentators had argued that corroboration should be required where a case is based on such evidence. However, it must be wondered whether a corroboration requirement would solve this perceived problem. Existing Scots authority indicates that the case against an accused is corroborated if two expert witnesses testify that a single, potentially incriminating fingerprint or palm print is that of the accused. The same principle presumably holds good for all scientific evidence. Thus a corroboration requirement in relation to such evidence would be of little practical consequence, unless the corroboration had to be found from a source independent of the item of evidence in question. Even then, it might be suggested that the real problem is that the corroboration requirement is simply being used to justify the admission of evidence of dubious reliability, that the admission of such evidence is the real issue, and that if the problem actually exists the Law Commission has the appropriate solution in seeking to ensure that, as far as possible, only reliable evidence is admitted in the first place.¹⁰⁹

A problem for Scots law?

There is also the question of whether the problem does exist in Scots law. Scots law has always taken a common sense approach to expert evidence. Thus all sorts of individuals who lack conventional professional qualifications have been treated as experts by the Scottish courts in order to speak to particular types of evidence.¹¹⁰ Yet at the same time, the courts have not shrunk from rejecting the evidence of those whom they do not regard as experts or at least not as experts on the issues on which the witnesses are asked to testify. Thus, in Hainey v HM Advocate,¹¹¹ the court cited the following statement in Davidson on Evidence:

¹⁰⁶ See Slater v Vannet 1997 SCCR 578.
¹⁰⁷ See Hamilton v HM Advocate 1934 JC 1.
¹⁰⁸ See HM Advocate v Rolley 1945 JC 155.
¹⁰⁹ There might also be merit in having neutral expert explanation of scientific evidence. See G Edmond, “Advice for the courts? Sufficiently reliable assistance with forensic science and medicine: part 2” (2012) 16 E&P 263.
¹¹⁰ See e.g. Lord Sorn in Hopes and Lavery v HM Advocate 1960 JC 104 at 113 (stenographer treated as expert witness), Lord Carmont in Hewat v Edinburgh Corporation 1944 SC 30 at 35 (council employee treated as expert witness), and Lord Justice-Clerk Ross in White v HM Advocate 1986 SCCR 224 at 226 (police officer treated as expert witness).
¹¹¹ [2013] HJCAC 47. The accused was charged with murdering her baby son by wilfully ill treating and neglecting him, after his badly decomposed body was found in her flat. For the Crown, forensic anthropologists, neither of whom were medically qualified, were allowed to give evidence that a phenomenon known as cortical erosion and lines on the baby’s bones, known as Harris lines, might be indicative of pre-death stress arising from neglect and malnutrition, even though that view had been seriously questioned by recent expert writing, medical experts had given contrary evidence, and both witnesses had accepted in evidence that they did not have the necessary competence and qualifications to speak to the matter.
¹¹² At para 49, citing Davidson, Evidence (n 4) para 11.13.
It is for the court to be satisfied whether a particular individual tendered as an expert does have sufficient relevant expertise to assist the court, and if this is not established the evidence of that witness is not admissible, even if the opposing party raises no objection.

It continued, stating that “questions as to the competence and experience of expert witnesses to speak to any particular topic are questions for the trial judge and not for the jury to determine”. Thus the court ordered the conviction in that case to be quashed, since the trial judge had allowed witnesses to opine on matters beyond their expertise, and advised the jury to consider their evidence.

This is of course not quite the same thing as excluding forensic evidence, not because the witnesses concerned are not properly qualified to speak to it, but because the field of evidence is not sufficiently reliable. Yet the High Court seemed prepared to assume that role in *Young v HM Advocate*, where the Scottish Criminal Cases Review Commission had referred Y’s case to the High Court for review of his 1977 conviction for murder. The SCCR was prompted to take this step because the police force responsible for investigating the murder had sent the commission a report in which it expressed the conclusion that the same person was responsible for six very similar murders carried out over a six month period, of which the murder of which Y was convicted was only one. Y could not have been responsible for several of these murders. Appended to the report was, *inter alia*, a report by the behavioural analysis unit at the FBI on whether a linkage between the six crimes could be established. The question for the court was whether expert evidence on case linkage analysis was admissible. It decided that it was not. The court opined that:

> expert evidence… must be based on a recognised and developed academic discipline. It must proceed on theories which have been tested (both by academic review and in practice) and found to have a practical and measurable consequence in real life. It must follow a developed methodology which is explicable and open to possible challenge, and it must produce a result which is capable of being assessed and given more or less weight in light of all the evidence before the finder of fact.

It ultimately concluded that case linkage analysis evidence, “in its present state of development”, did not meet that test.

The Scottish courts may thus be assuming a gatekeeping role in order to exclude suspect scientific evidence, such as is assumed by courts in Canada and, most famously, the USA. It must also be

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113 Ibid.
115 At para 54. It continued (at para 55) that: “[t]here are countless examples of evidence about such matters which are routinely regarded as based on sufficiently developed theories, which have sufficiently developed and certifiable methodologies, and produce results which have a practical effect and which may be weighed and assessed by a finder of fact that such evidence is admissible in court. So, scientific evidence about DNA comparisons, fingerprint evidence, evidence of medical practitioners or pathologists is evidence based on a sufficiently clear and reliable basis that it may assist the finder of fact, and will be admitted as evidence for the finder of fact to consider.”
116 See paras 56-60.
presumed that they would be as assiduous in excluding such evidence if it were sought to be tendered by the prosecution. Moreover, there is no sign of the Scottish courts admitting questionable forms of evidence such as ear prints. On the other hand, concerns regarding the admission of suspect forensic evidence are voiced as loudly in the USA as anywhere, despite the recent attempts by the US courts to ensure that “junk” science is not admitted. It may also be observed that among the forensic sciences singled out for criticism are several that have long been accepted by the courts as reliable.

Nonetheless, whatever the rights and wrongs of the above debate, the most important point for present purposes remains the fact that if a problem does exist, the solution certainly does not lie in a corroboration requirement.

Credibility contests

A further situation in which academic literature has suggested a corroboration requirement might be appropriate is in so called “credibility contests”, i.e. those cases where the only prosecution evidence is that of the complainer, and the case essentially comes down to the question of whether the fact finder believes the complainer or the accused. The argument here is that empirical studies consistently show that a person’s ability to determine when someone is telling the truth and when they are lying is little better than 50 per cent, and there appears to be a negative correlation between a person’s confidence in his or her judgment on that question and the accuracy of that judgment. Part of the problem is that what are commonly regarded as the most important non-verbal clues can be misleading. Thus signs of nervousness may indicate that the accused is

uncomfortable in the unfamiliar environment of a criminal court, or indeed finds the fact that his liberty is at stake to be immensely stressful. The same may be said of what people tend to regard as the most telling indicator of untruthfulness – gaze aversion, while it is the case that in certain cultures it is considered inappropriate to look directly at figures of authority when addressing them. It is thus asked whether it is possible to convict on a reasonable doubt standard when it is simply one person’s word against that of another.

The fact that the judgment of fact-finders may be suspect in credibility contests may indeed argue for some sort of corroboration, at least of the type which reinforces the credibility of the complainer or undermines the credibility of the accused, even if it is not directly incriminating. Alternatively, it may call for a corroboration warning (see below). However, implicit in the suggestion made in the last paragraph, is an argument which is made far more explicitly in certain of the articles on forensic evidence – that even where the scientific basis of that evidence is sound, the probability ratios are rarely of a level to justify convicting on the reasonable doubt standard on the basis of a single piece of evidence. Yet assuming the standard can be expressed mathematically in the first place, guilt in criminal cases is not determined on the basis of statistical probability, but on the basis of whether fact-finders decide that they are sufficiently persuaded by the evidence as a whole, a process which will be based on inductive rather than mathematical reasoning. It is difficult to imagine an alternative to this without abandoning the principle of trial by jury, and it may be suggested that any concerns one might have concerning the process would be better addressed by ensuring that jurors properly understood their role and the nature of the burdens and standards of proof involved rather than by insisting upon corroboration in such cases.

127 See also C Boyle, “Reasonable doubt in credibility contests: sexual assault and sexual equality” (2009) 13 E&P 269.
129 While some argue this is possible – see J Weinstein and I Dewsbury, “Comment on the meaning of ‘proof beyond a reasonable doubt’” (2006) 5 Law, Probability and Risk 167; others disagree – see R Simon and L Mahan, “Quantifying burdens of proof” (1971) 5 Law and Society Review 319; J Franklin, “Quantification of the ‘proof beyond reasonable doubt’ standard” (2006) 5 Law, Probability and Risk 159. See also G Williams, “The mathematics of proof” [1979] Crim LR 297 and 320. Interestingly enough, when fact-finders were asked to express the reasonable doubt standard mathematically in one survey, judges saw reasonable doubt as meaning certainty on a spectrum from over 80 per cent for some judges to over 95 per cent for others, while for some jurors anything over 60 per cent met the standard - see L Solan “Refocusing the burden of proof in criminal cases: some doubt about reasonable doubt” (1999) 78 Texas LR 105. In another study, the average degree of certainty required by jurors was under 53 per cent. That average rose only slightly after instruction - I Horowitz and L Kirkpatrick, “A concept in search of a definition: the effects of reasonable doubt instructions on certainty of guilt standards and jury verdicts” (1996) 20 Law and Human Behavior 655.
131 As ch 9 demonstrated, while research suggests that juries often struggle to follow instructions, matters may be ameliorated by the use of straightforward, non-technical language.
132 One study suggested that most jurors do not really understand the presumption of innocence. Half believed that a defendant always had to put forward some evidence of innocence to be acquitted, while two per cent assumed that the defendant had the burden of proof: D Strawn and R Buchanan, “Jury confusion: a threat to justice” (1976) 59 Judicature 478. In another study over 30 per cent of jurors believed that if the state has adduced evidence, it was then for the defendant to prove his innocence: S Saxton, “How well do jurors understand jury instructions?” (1998) 33 Land and Water LR 59.
14.5 Corroboration warnings

The final issue to be explored is whether, if the requirement for corroboration is abandoned, it may be necessary or desirable to issue a so-called “corroboration warning”. A corroboration warning is a particular type of jury direction that specifically warns the jury that it would be dangerous to convict the accused in the absence of corroborative evidence. Historically, corroboration warnings were required to be given in England and other systems in relation to certain types of evidence – the evidence of children, complainants in sexual offences and accomplices.

The warnings as they operated historically in England and Wales had four mandatory parts: (1) the warning itself saying it was dangerous to convict on the uncorroborated evidence of the witness but if the jury were satisfied that it was the truth they could nonetheless convict (2) an explanation of the meaning of corroboration (3) an indication of what evidence in law was capable of amounting to corroboration and (4) an explanation that it fell to the jury to decide whether that evidence did in fact constitute corroboration.

In light of criticisms of the unfounded prejudices underpinning this approach, however, the requirement to give corroboration warnings was abolished in England and Wales in respect of children’s evidence by section 34 of the Criminal Justice Act 1988 and in respect of accomplices, and complainants in alleged sexual offences by section 32 of the Criminal Justice and Public Order Act 1994. As regards complainants in alleged sexual offences, several other jurisdictions followed suit, while certain jurisdictions also abolished the mandatory requirement to give a warning in relation to the evidence of children.

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133 Jury directions more generally have already been considered in detail in this report: see chs 5-9. This section is confined to considering the more specific corroboration warning.
135 Some US jurisdictions indeed demanded actual corroboration of the complainant in rape cases, usually via statute – see Iowa Criminal Code art 782.4; New York Penal Law art 2013 – but sometimes as a result of judicial decision – see Stapleman v State, 34 NW 2d 907, 909-910 (Neb 1918).
136 The rule regarding accomplices remains in South Africa, albeit the court will be warning itself, since it is the decision maker – see Holmes JA in S v Hlapezula 1964 (4) SA 439 at 440.
137 Roberts and Zuckermann, Criminal Evidence (n 1) 671.
140 See the commentary by I Dennis in [1995] Crim LR 4.
141 See Evidence Act 1995 s 164(3) (NSW); Evidence Act 2001 s 164(3) (Tas); Evidence Act 1906 s 50(2)(a) (WA). See also Evidence Act 1995 s 164(3) (Cth). As regards New Zealand, see the Evidence Amendment Act (No 2) 1985 (NZ). The philosophical basis of the rule has been rejected judicially by the Supreme Court of California in State v Rincon-Pineda (1975) 538 P 2d 247, 254-60 and by the South African Supreme Court of Appeal in S v Jackson 1998 (1) SACR 470. See Oliver JA at 476. For the previous rule see Holmes JA in S v Snyman 1968 (2) SA 582 at 585. See also Fryer, “Law versus prejudice: views on rape through the centuries” (1994) 7 South African Journal of Criminal Justice 74. The Supreme Court of Namibia followed the decision in S v Jackson in S v
What is the significance of these developments in a Scottish context? Corroboration warnings of the traditional type have never played a role in Scots law, due to the presence of a general corroboration requirement. However, the fact that there always has been a general corroboration requirement in Scots criminal law, coupled with the fact that the judiciary is almost universally opposed to its abolition, suggests that the courts might struggle to resist the temptation to warn juries of the dangers of proceeding on the basis of uncorroborated evidence. Although Lord Carloway, having recommended the abolition of the requirement, indicated that it would be important “to make it clear that, although a trial judge may, as his/her discretion in a particular case, give a jury assistance, by way of warning or otherwise, as is appropriate in relation to the credibility and reliability of witnesses, the law does not require that a warning be given in any case simply on the basis that there is a lack of corroboration”, the Criminal Justice Bill is silent on the matter. So it may be that courts will regard themselves as having unfettered discretion to issue warnings either universally or in certain circumstances.

The question then arises as to whether such warnings should be specifically prohibited. In certain jurisdictions the legislature has gone further than simply abolishing the need to provide warnings against convicting on the uncorroborated evidence certain types of witness where the rule was based on ill-founded prejudice. To eradicate such prejudice from the system, it has sought to prohibit the giving of warnings in certain circumstances. Thus the New Zealand Evidence Act 2006 section 125(1) provides that where the complainant is a child, the judge must not give a corroboration warning if he or she would not have given such a warning had the complainant been an adult. Where a witness is a child section 125(2) provides that the judge should not instruct the jury that there is a need to scrutinise the evidence of children with special care, nor suggest to the jury that children have a tendency to invent or distort, unless expert evidence has been given which would support the giving of such an instruction or suggestion. Equally, in certain Australian states judges are prohibited from warning juries that children or complainants are unreliable witnesses. Moreover, section 274 of the Canadian Criminal Code indicates that, where the accused is charged with certain sexual offences, not only is corroboration not required, but “the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration”. However, the judge still has to review the evidence for the jury and instruct them as to their role, so that prohibition has not been interpreted as absolute. As Cory JA points out in *R v Boss*, “there is nothing in the section which would prohibit a judge from exercising his or her discretion when reviewing the factual issues with the jury”. Similarly, the Australian Reform Commission says of


142 See e.g. s 659 of the Criminal Code of Canada.


144 In *Gage v HM Advocate* [2011] HCJAC 40 at para 23 it was observed that “this court has held that psychiatric or psychological evidence would have been admissible on the question of the reliability of a child witness in light of the interviewing techniques used (*AJE v HM Advocate* 2002 JC 215)... but it was not admitted in *HM Advocate v Grimmond* 2002 SLT 508 on the question of the reliability of child complainers where there was no suggestion that they were other than ordinary, normal children.”

145 See e.g. Evidence Act 1995 s 165A (NSW).

146 See e.g. Crimes Act 1958 s 61 (Vic).


148 At 531.
These provisions do not prevent a judge from making any comment on evidence . . . . that it is appropriate to make in the interests of justice – for example, warning that a particular child’s or complainer’s evidence, or the particular circumstances of the witness, may affect the reliability of that evidence.

This does not mean that such prohibitions may not be desirable, but it must be recognised that they are be unlikely to be judge-proof. Of course in Scotland judges do not sum up the evidence in the same fashion as elsewhere, so the issue may be less acute in this jurisdiction. Even so, there is no clear evidence to suggest that a provision specifically prohibiting corroboration warnings in Scotland is required at present.

14.6 Summary

While Scots law embraces a fairly wide concept of corroborative evidence, other systems treat certain types of evidence as corroborative, which would not be so regarded in Scotland. Consideration could be given to these examples if it were thought necessary to enumerate categories of supporting evidence in the absence of a corroboration requirement, for example in relation to confession evidence or hearsay evidence.

Although Scots law stands out in retaining a general corroboration requirement, certain systems do insist on corroboration in relation to particular crimes or with regard to situations where the prosecution case is reliant on particular forms of evidence. The examples of corroboration requirements in relation to particular crimes offer no particular lesson for Scots law.

As regards particular forms of evidence, the possibility of a supporting evidence requirement for confessions and hearsay evidence has already been suggested in previous chapters of the report. It has sometimes been suggested that a case should not be able to be proved on the basis of a single piece of forensic evidence. This is partly because it is believed that no case can be established beyond reasonable doubt on the basis of a single piece of forensic evidence, and partly because the scientific basis of much such evidence is suspect. It is suggested that, in both these instances, corroboration is a red herring. In the former case, the argument is based on a misunderstanding of the nature of legal proof, while in the latter case the solution lies in a more exacting reliability standard for the admission for such evidence. It has also been suggested that no case can be established beyond reasonable doubt where it essentially involves one person’s word against another, given that individuals are poor judges of credibility. Again, however, this misunderstands the nature of legal proof.

Finally, consideration was given to the issue of whether mandatory “corroboration warnings” in respect of certain types of witness ought to be given, as was the case historically in England and Wales (and other common law jurisdictions). However this idea was rejected. That is not to say that jury directions do not have merit. Other chapters of this report suggest these may provide important

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151 As was suggested in chs 6 (confessions) and 8 (hearsay).
safeguards against wrongful conviction in cases involving eyewitness identification evidence, confession evidence and the evidence of accomplices and informers. What is rejected here is the narrower idea of the mandatory corroboration warning as it used to operate in England and Wales. It has been abolished there and in every other major common law jurisdiction and there is no place for it in Scots law.

\[152\] See chs 5, 6 and 7 respectively.
CHAPTER 15: INDEPENDENT LEGAL REPRESENTATION FOR COMPLAiners IN SEXUAL OFFENCE CASES

James Chalmers

15.1 Introduction

As with the recording of police interviews (chapter 10 of the report), independent legal representation for complainers in sexual offence cases (ILR) is not expressly part of the (non-exhaustive) remit of the Post-Corroboration Safeguards Review. It was, however, suggested from within the Reference Group as an appropriate topic for the Review to consider, and Lord Bonomy asked the expert group to address this issue as part of its report.

A considerable amount of work on the possibility of introducing ILR in Scotland has already been done by Fiona Raitt, who produced a report on the issue for Rape Crisis Scotland in 2010, and published an article on the topic in the Criminal Law Review in 2013. Rape Crisis Scotland and Professor Raitt have kindly agreed to the 2010 report being included as an appendix to this report.

As the report is an extensive treatment of the topic, there is a limit to what can usefully be added here, and this chapter does not seek to offer a full treatment of ILR. Instead, it summarises what might be proposed under this heading and highlights certain points for the Review’s consideration.

15.2 What might ILR entail?

The phrase “independent legal representation” might be used to refer to a wide variety of schemes. As Raitt’s report demonstrates, the nature and extent of such schemes varies considerably between different jurisdictions. It need not involve representation throughout proceedings, and this is not what has been proposed for Scotland to date. Raitt highlights two specific situations where the Crown is placed in particular difficulty in guarding both the accused’s right to a fair trial and the interests of the complainer: the confidentiality of personal records and the use of sexual history evidence, and develops an argument for ILR focused on these particularly problematic issues.

Drawing on Raitt’s work, Rape Crisis Scotland prepared a proposal for ILR suggesting that it should be permitted in two cases, as follows:

1. Procedures for providing a right to representation where the Crown seeks access to a complainer’s medical and / or other sensitive records

   Where the Crown Office seek access to a complainer’s medical or other sensitive records, the Crown should have an obligation to notify the complainer that they have the right to seek legal advice in relation to this. The costs of this legal advice should be covered by legal aid on a non means tested basis.

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2 F E Raitt, Independent Legal Representation for Complainers in Sexual Offence Trials (2010). Professor Raitt’s paper is included as it was originally published, separately paginated, at the end of this report.
3 Para 7.12.
If following legal advice the complainer refuses consent for the Crown Office to access her records and the Crown decides to seek a warrant for those records, as per their policy, then the complainer should have the right to representation at any hearing. Her legal representative should be given legal standing to participate in this hearing to enable her views to be represented. Again, this should be funded by legal aid on a non means tested basis.

Procedures for providing a right to representation where either the Crown or the Defence submits a s 275 application to introduce a complainer’s sexual history and character

There is already a clear process in place with regard to applications to introduce evidence relating to a complainer’s sexual history or character. Both the Crown and the Defence need to make a formal application to introduce this evidence, and the application and any objections are considered at a preliminary hearing. It would be relatively straightforward to introduce a right to representation for the complainer within this process – complainers should be notified of their right to obtain advice and representation in any circumstance where a s275 application is being lodged. If they choose to utilise this right, their legal representative would receive a copy of the application and be entitled to object to its introduction on behalf of the complainer and to attend the preliminary hearing to represent the complainer’s view in relation to the application. This right should also apply to any late s275 applications which are lodged post the preliminary hearing stage.

As this makes clear, what is contemplated here is not any sort of status as an equal party with the prosecutor; it is instead a right to make representations at certain specific points. It bears similarities to the limited rights to representation which have been recognised in Canada (in respect of disclosure of personal records) and Ireland (in respect of applications to lead sexual history evidence).

When the Victims and Witnesses (Scotland) Bill was being considered by the Scottish Parliament, Margaret Mitchell MSP tabled an amendment which would have created a right to ILR in cases where information about health or other sensitive information was sought in relation to a person who was or appeared to be the victim of a sexual offence (a right which would have been rather broader than that suggested in the proposal from Rape Crisis Scotland noted above). The amendment made provision for the right to be implemented on a pilot basis in the first instance, with a report on the pilot being required. The Cabinet Secretary for Justice expressed concern about the practicality of aspects of the amendment, and suggested, while undertaking to have further discussion with relevant parties, that it was inappropriate for the proposal to be placed in primary legislation. The amendment was put to a vote and defeated. In January 2014, Ms Mitchell raised the possibility of ILR again in Parliament, and the First Minister stated that he would “ask the Cabinet Secretary for Justice to look seriously at that suggestion”.

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5 See Raitt, Independent Legal Representation (n 2) paras 4.07-4.08.
6 Paras 4.17-4.18.
15.3 Some observations on the scope and practicality of ILR

ILR in relation to medical and/or other sensitive records

The proposal from Rape Crisis Scotland refers to a right of ILR in respect of the Crown retrieving sensitive material. By way of comparison, it might be noted that in England and Wales, such material would be “excluded material”,9 meaning that special safeguards would apply to an application for a warrant to obtain it. Whereas search warrants in England and Wales may normally be granted by a magistrate,10 warrants to obtain excluded material must be sought from a circuit judge and applications are made inter partes.11 This provides a level of safeguard against disclosure of such material as part of a criminal investigation which is not applicable in Scotland.12 The introduction of ILR (along with a procedure allowing the complainer to be heard) in respect of such warrants would be a significant change to current procedure, although the expert group has no information on whether the Crown frequently have to seek a warrant to obtain such information, and cannot therefore comment on the practical consequences of any such right being introduced.

The access of the Crown to such material may not, however, be the most significant problem here. A complainer may be willing for the Crown to have such information but be unwilling for it to be disclosed to the defence. Discussions of the difficulties faced by complainers in this area are generally concerned with disclosure of such material by the Crown to the defence.13 Although the Rape Crisis Scotland proposal does not refer to this stage of proceedings,14 ILR may have a more important role here, and in two contexts. The first is where the Crown applies to the court for an order preventing or restricting disclosure of specified material.15 In that situation, ILR, in the form of the complainer being represented at a hearing to determine the Crown’s application, might readily be accommodated.16 The second – more difficult and perhaps more likely – case, however, is that where the Crown considers that it is obliged to disclose the information. As this would be done directly between the Crown and the defence, there is no existing procedural stage at which ILR can be accommodated. ILR would require a change to the statutory disclosure regime, perhaps in the form of notification to the complainer that the Crown intended to make such disclosure and a right for the complainer to seek a hearing on whether the material could properly be disclosed.

ILR in relation to section 275 applications

In considering ILR in relation to section 275 applications, considerations of timing should be borne in mind. An application for permission to lead sexual history evidence must (in High Court cases) be

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9 Police and Criminal Evidence Act 1984 (PACE) s 11.
10 s 8.
11 s 9 and Sch 1.
12 Something which caused some difficulty in R v Manchester Stipendiary Magistrate, ex p Granada Television Ltd [2001] 1 AC 300, where a warrant was granted in Scotland to search for material which would have been subject to these special procedures had it been sought in England. The House of Lords held that the warrant was nevertheless enforceable under the legislation governing cross-border enforcement of warrants, as the procedures under PACE were not available to Scottish prosecutors and it would be anomalous for Parliament to have intended that they be unable to retrieve material in such circumstances.
14 Unlike Raitt (n 1) at 748.
15 Under the Criminal Justice and Licensing (Scotland) Act 2010 Pt 6.
16 Consideration would have to be given to whether the complainer would, independently of the Crown, have a right of appeal against a refusal to make such an order.
made at least seven days before the trial diet or (in all other cases) no less than fourteen clear days before the trial diet. The trial judge, however, can consider an application at any later stage “on special cause shown”.\(^{17}\)

Assuming that these timescales are sufficient to allow for ILR to be arranged in practice once an application is made, a problem remains in cases where section 275 applications are lodged at a later date. An evaluation of the changes made to the law of sexual history evidence by the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 found that in a sample of 32 High Court cases, seven section 275 applications were made at the start of the trial, with a further application being made during the trial itself.\(^{18}\) That is, applications were made at the start of the trial or later in one-quarter of the cases.\(^{19}\) The trial judge accepted in all but one of these cases that “special cause” had been shown, allowing the application to be considered.\(^{20}\)

The possibility of a section 275 application being lodged at the trial might seriously undermine ILR. Although Rape Crisis Scotland’s proposal suggested that ILR “should also apply to any late s 275 applications which are lodged post the preliminary hearing stage”, adjourning the trial diet to enable the complainer to obtain legal representation may be impractical and lead to significant delay and distress even where it is possible. The application could be determined without ILR, but if ILR in practice reduces the extent to which section 275 applications are successful, late applications might become more common. In order to be properly effective, therefore, ILR might require that representation is provided as a matter of course at the trial diet itself, at least until the complainer has given evidence. That, in turn, raises the question of whether the independent legal representative should have further rights: most obviously, should they be entitled to object that certain questions asked by the defence (or, indeed, the Crown) are improper, particularly (but perhaps not exclusively) on the basis that they are incompatible with the decision on the section 275 application?

### 15.4 Is ILR exceptional?

ILR may be regarded as unusual in the common law world, but it has been accommodated in Canada and Ireland to the limited extent outlined in Raitt’s report. It is, by contrast normal in continental Europe for complainers to have some form of entitlement to legal representation.\(^{21}\) It might be suggested that such systems offer no lesson regarding the importance of ILR as a distinct right in sexual offence cases, but simply represent different models of criminal procedure, where all (alleged) victims have established rights in the criminal process, and where the criminal and civil processes may be systemically interlinked, in contrast to their strict separation in Scotland.

However, at least some continental systems have also recognised that sexual offences are distinctive, and have reflected this either through the design of systems of legal representation or

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17 Criminal Procedure (Scotland) Act 1995 s 275B.
19 In the case where the application was made during the trial itself, this was the second application. It is assumed that the first application was made timeously (and so was not one of the seven made at the start of the trial), but this is not absolutely clear from the report.
21 See Raitt, *Independent Legal Representation* (n 2) para 3.03.
their use in practice. A 1999 study of the position of alleged victims of crime in German courts observed that the use of the *Nebenklage* procedure, “permit[ting] victims to participate through counsel at trial on nearly equal footing with the state’s attorney and the defense”, 22 was relatively limited in general, but much more common in sexual assault cases. The authors cited data including one 1988-90 survey showing that about 20 per cent of eligible complainers used the procedure, rising to 67 per cent in sexual assault cases, while anecdotal evidence suggested that the rate at which the procedure was invoked in sexual assault cases had risen since then. 23

Elsewhere, Denmark introduced a right to legal representation for complainers in rape cases in 1980, but did not extend this to other victims of crime until 1997. 24 A similar development occurred in Sweden, where the role of injured party counsel was initially developed for cases of serious sexual offences, which a government report suggested could be distinguished from other offences in two respects: first, sexual offences were a particularly gross infringement of the victim’s integrity and secondly, the credibility of the complainer’s account was nearly always of great significance in sexual offence cases due to the lack of other evidence. These facts, it was suggested, meant that complainers in sexual offence cases were in greater need of support. 25 While subsequent developments (as elsewhere in Scandinavia) 26 expanded the role of the injured party counsel beyond sexual offence cases, a more recent report emphasised the special needs of complainers in sexual offences and child complainers, recommending enhanced provision in such cases. 27

15.5 Issues for consideration

It is assumed from the fact that the expert group has been asked to cover ILR in this report that the Review will wish to consider whether a pilot ILR scheme might be recommended for Scotland and what its scope should be. Accordingly, this chapter is presented solely to inform the Review in considering these issues. It is suggested that it will be necessary to consider:

(a) whether the principle of ILR should be supported;
(b) whether any ILR scheme should be introduced on a pilot basis in the first instance;
(c) at which stages of the criminal justice process ILR should be permitted, and
(d) whether and to what extent the legal framework governing warrants and disclosure should be amended to permit this.

23 At 55 n 76; see also 59: “Sexual assault victims’ desire for legal representation may be due to the highly personal and demeaning nature of the crime, as well as the nature of such trials, where it is not unusual for the character or reputation of the victim to come under attack.” See also E Erez and E Bienkowska, “Victim participation in proceedings and satisfaction with justice in the continental systems: the case of Poland” (1993) 21 Journal of Criminal Justice 47 at 50; noting that use of the “supporting or subsidiary prosecutor” system in Poland was more common in crimes against the person (including sexual assaults) than crimes against property, but not distinguishing between sexual and non-sexual crimes against the person.
27 Ibid.
CHAPTER 16: EVIDENTIAL RULES IN CRIMINAL TRIALS: AN INTERNATIONAL COMPARISON

Pamela R Ferguson

16.1 Introduction

This chapter considers the laws of criminal procedure and evidence in other common law and continental jurisdictions, particularly in relation to the use of supporting evidence and other safeguards against wrongful conviction. It summarises the main findings of a questionnaire which was sent to legal experts in 15 jurisdictions, supplemented by a search of the relevant case law, legislation and academic literature, where available. The jurisdictions surveyed were: Australia, Austria, Canada, England, Germany, Ireland, Italy, the Netherlands, New Zealand, Norway, South Africa, Sweden, Switzerland and the United States of America. There were two respondents from the USA, one commenting on the Federal Law, and the other on the law in the State of New York. It must therefore be borne in mind that the laws of other states may differ. The Australian respondent is based in New South Wales (NSW) but answered the questions primarily from the point of view of the NSW Evidence Act 1995. NSW is one of several Australian jurisdictions to subscribe to a system known as “Uniform Evidence Law”, the others being Victoria, Tasmania and the Commonwealth Federal system. As such, the answers given also apply to these jurisdictions. In the remainder of the report references to “Australian law” should be taken to mean references to NSW and the other uniform evidence jurisdictions.

It should also be kept in mind that continental European systems tend to adopt an approach which allows for a “free evaluation of proof” or “free assessment of evidence”; almost anything is admissible as evidence and it is for the trial court to decide what they make of it. This reflects their inquisitorial heritage and the fact that several do not have juries. Thus in Austria and Germany, for example, no distinction is made between witnesses for the prosecution and defence witnesses: all are “judge’s witnesses”. There is no distinction between examination in chief and cross-examination. The trial judge is trusted to weigh and assess the evidence correctly, applying logic and common sense.

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1 The respondents were: Ragna Aarli (Bergen); Alberto Cadoppi (with assistance from Michele Boggiani, Parma); Chris Gallavin (Canterbury); Lissa Griffin (Pace); David Hamer (Sydney); Verena Murschetz (Innsbruck); Pamela Schwikkard (Cape Town); Sarah Summers (Zurich); Magnus Ulväng with assistance from Daniel Clausén, Uppsala; Leonie van Lent (Utrecht), and Thomas Weigend (Cologne). The respondents from universities in Canada and England, preferred to remain anonymous, as did a lawyer from the Office of the Irish DPP and the respondent who commented on the US Federal system. I am most grateful to all respondents for taking the time to answer the questionnaire. I alone am responsible for any errors or omissions in this chapter.

2 Evidence Act 2008 (Vic).

3 Evidence Act 2001 (Tas).

4 Evidence Act 1995 (Cth).

5 See, for example, the Swiss Criminal Procedure Code (2007) art 10 para 2: “The court shall be free to interpret the evidence in accordance with the views that it forms over the entire proceedings.”
16.2 The questionnaire

- Respondents were asked whether their prosecution service employs a test of “sufficiency of evidence”, “reasonable possibility of conviction”, or something similar, and whether this is a statutory test.\(^6\)

- They were asked whether their courts apply any other test or evidential requirements in determining guilt.\(^8\)

- They were asked whether an appeal may be allowed/conviction quashed if their appeal court takes the view that the evidence at the trial was insufficient, or insufficiently strong, to warrant conviction.\(^9\)

- Five hypothetical scenarios were posited and respondents asked about the types of evidence that would suffice for prosecution in such cases.\(^10\)

- Since identification and confession evidence can be particularly problematic, respondents were asked about each of these, and about any safeguards which must be used before such evidence is admissible.\(^11\)

- The rules of evidence in Scotland are in large part a product of our use of the jury system. Table 7 summarises the use of juries in the various jurisdictions, and the use of warnings which trial judges may or must give in respect of certain forms of evidence.

16.3 Prosecutorial tests\(^12\)

The Prosecution Code published by the Scottish Crown Office and Procurator Fiscal Service (COPFS) states that: “The Procurator Fiscal must be satisfied that there is sufficient admissible evidence to justify commencing proceedings.”\(^13\) The current need to ensure that there is corroboration is a primary focus of concern for Scottish prosecutors. The abolition of the corroboration requirement may require the formulation of an alternative prosecutorial test.

Most jurisdictions employ a test which prosecutors must satisfy prior to taking a case. Some employ a positive test, such as whether there is a “realistic” or “reasonable” prospect of conviction; this is

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\(^6\) The questionnaire is included as an annex to this chapter. Note that not all findings are included in this chapter. Many respondents expressed their willingness to be approached again if further information is required by the Review.

\(^7\) See also Table 1.

\(^8\) See Table 2.

\(^9\) See Table 3.

\(^10\) See Table 4.

\(^11\) See Tables 5 and 6.

\(^12\) See also ch 10.

the test in England, the Netherlands, New Zealand and South Africa. The English test is sometimes referred to as the “51 per cent rule”. In the American Federal system and in the State of New York, in seeking an indictment before a grand jury a prosecutor must show that there is “probable cause” to believe that the accused has committed a crime, meaning that it is “more likely than not” that the accused is guilty. In Austria, a prosecution must be brought (there is little discretion) if “conviction seems likely”, and in Germany prosecutors must be satisfied that there is “sufficient reason” to take the case, meaning that there is a “high probability” that the defendant will be found guilty at trial. In Norway, a criminal investigation is carried out when there are “reasonable grounds to inquire” whether prosecution is required, but it seems that a prosecution can only be instituted if the written evidence suggests that the accused is guilty “beyond a reasonable doubt”. In Switzerland, the prosecution must institute proceedings if “it regards the grounds for suspicion as sufficient”.

Other jurisdictions employ similar tests, but express them negatively. Thus, a case should be dismissed by a prosecutor in Italy if there are not “sufficient elements to support the prosecution”, and a prosecution should not take place if there is “no reasonable prospect of conviction” in Australia and Canada, or if there is “no reasonable prospect of success” in Ireland. The Irish DPP’s Guidelines for Prosecutors expands on this, stating that “a prosecution should not be brought where the likelihood of a conviction is effectively non-existent”. However, it is also stated that: “Where the likelihood of conviction is low, other factors, including the seriousness of the offence,

15 It is referred to in the Netherlands as the “attainability test.”
18 See ch 11.2.
19 US Constitution, 5th Amendment: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury...”. See also (New York) Criminal Procedure Law s 190.65(1), which refers to “reasonable cause”.
20 Code of Criminal Procedure 1975 (most recently amended 2013). According to the Austrian Constitution prosecutors are judicial officers. They are considered to be neutral and objective and must look for exculpatory evidence during the pre-trial investigation of the facts.
24 Italian Criminal Procedure Code art 125.
27 Guidelines for Prosecutors, para 4.9. See also para 4.11.
28 Ibid.
may come into play in deciding whether to prosecute.”29 This suggests that less confidence of success can suffice in more serious cases.

The Canadian Federal Prosecution Service Deskbook expands on the meaning of its test of “no reasonable prospect of conviction”:

In the assessment of the evidence, a bare prima facie case is not enough; the evidence must demonstrate that there is a reasonable prospect of conviction. This decision requires an evaluation of how strong the case is likely to be when presented at trial... A proper assessment of the evidence will take into account such matters as the availability, competence and credibility of witnesses and their likely impression on the trier of fact, as well as the admissibility of evidence implicating the accused. Crown counsel should also consider any defences that are plainly open to or have been indicated by the accused, and any other factors which could affect the prospect of a conviction...

Crown counsel must also zealously guard against the possibility that they have been afflicted by “tunnel vision”, through close contact with the investigative agency, colleagues or victims, such that the assessment is insufficiently rigorous and objective.

This evidential standard must be applied throughout the proceedings – from the time the investigative report is first received until the time of trial... Counsel are expected to review the decision to prosecute in light of emerging developments affecting the quality of the evidence and the public interest, and to be satisfied at each stage, on the basis of the available material, that there continues to be a reasonable prospect of conviction.

As this extract from the Canadian Desk book makes clear, a prosecution must be “in the public interest”.31 This is also the case in Australia (where it is described as “the paramount criterion”32), England,33 Ireland,34 and New Zealand.35 These tests usually take the form of guidelines developed by prosecutors.36 Provision may be made for such guidelines by statute,37 but they generally do not

29 Ibid.
30 Federal Prosecution Service Deskbook, section 15.3.1 (footnotes omitted). See also the decision of the Supreme Court of Canada in USA v Sheppard [1977] 2 SCR 1067 at 1080, in which the test was described as being whether there “is there any evidence upon which a reasonable jury properly instructed could return a verdict of guilty”. A similar requirement to review the decision to prosecute is given in the English Code for Crown Prosecutors (2013), para 3.6: “Review is a continuing process and prosecutors must take account of any change in circumstances that occurs as the case develops, including what becomes known of the defence case.”
31 This is referred to also in the Scottish Prosecution Code, as described above.
32 NSW Prosecution Guidelines, section 4 (p 8).
34 Irish DPP’s Guidelines for Prosecutors.
35 Solicitor-General’s Prosecution Guidelines para 5.1.2. See also paras 5.5-5.11.
36 This is the case in Australia: NSW Prosecution Guidelines; England: Code for Crown Prosecutors (2013); Ireland: DPP’s Guidelines for Prosecutors; and New Zealand: Solicitor-General’s Prosecution Guidelines (July 2013).
have legislative force. The test is, however, enshrined in legislation in Austria,\(^{38}\) Germany,\(^{39}\) Italy, the State of New York\(^{40}\) and Switzerland.\(^{41}\)

### 16.4 Corroboration: general

Some jurisdictions require corroboration for certain offences only, e.g. for perjury (Canada, England,\(^{42}\) Ireland, New Zealand\(^{43}\)) and treason (Canada, New Zealand,\(^{44}\) the USA\(^{45}\)). The former seems to be based on a fear that witnesses would be reluctant to give evidence in criminal cases if they could then be prosecuted for perjury on the testimony of one witness.\(^{46}\) Such exceptions seem difficult to justify. In England, there was formerly a requirement for trial judges to warn juries of the dangers of convicting in sexual offences where the complainant’s evidence was not corroborated. This requirement was abolished in 1994,\(^{47}\) and is now a matter for the discretion of the trial judge.\(^{48}\) The *Crown Court Bench Book* advises:\(^{49}\)

> In some cases, it may be appropriate for the judge to warn the jury to exercise caution before acting upon the unsupported evidence of a witness. *This will not be so simply because the witness is a complainant of a sexual offence….* There will need to be an evidential basis for suggesting that the evidence of the witness may be unreliable. An evidential basis does not include mere suggestions by cross-examining counsel.

Corroboration warnings in sexual offences are also at the discretion of the trial judge, in Ireland.\(^{50}\) By contrast, in Canada for certain sexual offences s 274 of the Criminal Code 1985 specifies that “no corroboration is required for a conviction and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration”. Such warnings are controversial since they tend to imply that complainers in sexual offence cases are more likely to lie than complainers in other types of cases.\(^{51}\)

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39 Code of Criminal Procedure s 170.
40 Criminal Procedure Law s 190.65(1).
42 Perjury Act 1911 s 13.
43 Crimes Act 1961 s 112 (NZ): “No one shall be convicted of perjury, or of any offence against section 110 [false oaths] or section 111 [false statements or declarations], on the evidence of 1 witness only, unless the evidence of that witness is corroborated in some material particular by evidence implicating the defendant.”
44 Crimes Act 1961 s 75(1) (NZ).
45 Article III of the US Constitution.
46 See ch 14.
47 Criminal Justice and Public Order Act 1994 s 32. For further discussion, see ch 14.
48 *R v Makanjuola* [1995] 1 WLR 1348. For further discussion, see ch 7.
50 Criminal Law (Rape) (Amendment) Act 1990 s 7(1): “It shall be for the judge to decide in his discretion, having regard to all the evidence given, whether the jury should be given the warning”. No particular form of words is required (s7(2) of the 1990 Act). See P Charleton and S Byrne, “Sexual violence: witnesses and suspects: a debating document” (2009) 1 Irish LJ 1.
51 See the discussion in ch 14.
16.5 Problematic evidence: hearsay, accomplices, identification evidence, confessions

This section considers the position in other jurisdictions where the prosecution case relies solely on the testimony of one witness, and also considers how some highly problematic forms of evidence – accomplice evidence, hearsay, identification evidence and confessions – are dealt with elsewhere.\(^{52}\) It should be noted that in the State of New York hearsay evidence, evidence from alleged accomplices, and confessions, each require corroboration.\(^{53}\)

16.6 Where the prosecution case is based entirely on the evidence of a single witness

In the Netherlands, the principle of unus testis, nullus testis (“one witness is no witness”)\(^{54}\) means that a court cannot convict an accused on the basis of one source of evidence, alone.\(^{55}\) However, there is no mechanism to formally bar prosecutions that do not meet this. Despite the lack of a formal corroboration requirement in other jurisdictions, it seems that supporting evidence is frequently required, as a matter of practice. The position is well-summarised by the respondent from New Zealand:

> Of course none of my comments above would mean that a prosecutor would not follow every lead available in trying to find supporting evidence. They are not required as a matter of law, but as a matter of proof are often vital in establishing in the mind of a prosecutor and ultimately a court whether a case has been proved beyond reasonable doubt.

This makes clear that satisfying a prosecutorial threshold test is one thing; satisfying a trial judge or jury at trial may be quite another. In Australia, if the prosecution seeks to establish the guilt of an accused person with a case based largely or exclusively on a single witness, the jury are told that they should exercise caution. Thus the NSW Bench Book provides this direction for juries in such cases:\(^{56}\)

> You must exercise caution before you convict the accused because the Crown case largely depends on you accepting the reliability of the evidence of a single witness. This being so, unless you are satisfied beyond reasonable doubt that the [essential Crown witness/complainant] is both an honest and accurate witness in the account [he/she] has given, you cannot find the accused guilty. Before you can convict the accused, you should examine the evidence of the [essential Crown witness/complainant] very carefully in order to satisfy yourselves that you can safely act upon that evidence to the high standard required in a criminal trial.

That caution is not based upon any personal view that I have of the [essential Crown witness/complainant]. I told you at the outset of this summing up that I would not express my personal opinions on the evidence. But in any criminal trial, where the Crown case relies

\(^{52}\) See also ch 4: “Causes of Wrongful Conviction”; ch 5: “Eyewitness Identification Evidence”; ch 6: “Confession Evidence”; ch 7 “Evidence of Accomplices and Informers”; and ch 8: “Hearsay Evidence”, which look at these issues in detail.

\(^{53}\) These are discussed further, below.

\(^{54}\) Discussed in detail in ch 18.

\(^{55}\) Code of Criminal Procedure (1926) s 341.

solely or substantially upon the evidence of a single witness, a jury must always approach that evidence with particular caution because of the onus and standard of proof placed upon the Crown.

I am not suggesting to you that you are not entitled to convict the accused upon the evidence of the [essential Crown witness/complainant]. Clearly you are entitled to do so but only after you have carefully examined the evidence and satisfied yourself that it is reliable beyond reasonable doubt. In considering the [essential Crown witness/complainant’s] evidence and whether it does satisfy you of the accused’s guilt, you should of course look to see if it is supported by other evidence.”

Evidence from a complainant in an alleged rape or assault case can suffice for a prosecution in most of the countries surveyed, with the exception of the Netherlands and Sweden. However, as the Austrian respondent pointed out, while the evidence of the complainant “would definitely be enough to take the case, this doesn’t mean that it is necessarily enough for a conviction”. In the words of the respondent from England, “it is only common sense that a prosecutor would look for some support for the evidence of the complainant”. A similar comment was made by the Norwegian respondent: “the risk of [this type of] case being dropped due to lack of evidence to establish guilt beyond reasonable doubt is obvious. Supporting facts would have to be searched for.”

16.7 Hearsay evidence

Common law jurisdictions generally do not permit hearsay evidence, but some allow limited common law and/or statutory exceptions to this (Australia, Canada, England, Ireland, New York State, US Federal system), for instance, in allowing an exception in circumstances similar to the Scottish res gestae rule. In New York State, hearsay is generally inadmissible, but can be permitted for “present sense impressions”, such as a “spontaneous description of an event made substantially contemporaneously with the observation”, but this description requires to be corroborated by other evidence. In Australia, the statement would have to have been made when or shortly after the asserted fact occurred and in circumstances that made it unlikely that the representation was a fabrication. In Canada, such evidence would have to satisfy the criteria of reliability and necessity. A “reasonable assurance of reliability” is also required before an exception can be made to the hearsay rule in New Zealand.

Hearsay evidence may sometimes be sufficient for prosecution, without supporting evidence, in Australia, Austria, Canada, England, Germany, Italy, New Zealand, Norway, South Africa and Switzerland, (but not in Ireland, South Africa, and the USA). However, as the Norwegian respondent explained:

In principle yes [this hearsay evidence would be sufficient evidence for a prosecution], but it would probably be difficult to meet the standard of [proof]

57 People v Brown, 80 NY 2d 729, 734 (1993).
58 Evidence Act 1995 s 65(2) (NSW). This is similar to the Scottish res gestae rule.
60 Evidence Act 2006 s 18.
61 Note, however, the issues of ECHR compatibility in this respect for the jurisdictions in this list that are signatories to the Convention: see the detailed discussion of Al-Khawaja and Tahery v UK (2009) 49 EHRR 1 and the subsequent case law of the European Court of Human Rights in ch 8.
“beyond reasonable doubt” based on this hearsay evidence alone. The result would most likely be that the case is dropped.

Similarly, the South African respondent commented that where a case was based entirely on hearsay evidence, “the prosecution would probably decline to prosecute – as the courts would be reluctant to convict on the basis of a hearsay statement alone”. The comments from the Norwegian and South African respondents are also applicable to Australia. In the Netherlands, hearsay evidence may be sufficient for a prosecution, but not if that evidence comes from one person only (an application of the “unus testis, nullus testis” rule). Allowing hearsay evidence to be the sole and decisive evidence in a Scottish criminal trial may amount to a breach article 6 of the ECHR.\(^{62}\)

### 16.8 Accomplice evidence

Evidence from an alleged accomplice who has already pled guilty can be sufficient \textit{per se} for conviction in many jurisdictions.

In England, the trial judge has discretion as to whether or not to warn the jury of the dangers of convicting on the basis of accomplice evidence, the mandatory warning having been abolished in 1994.\(^{63}\) The \textit{Crown Court Bench Book} suggests the following direction for juries:\(^ {64}\)

\begin{quote}
[The alleged accomplice (A)] gave evidence for the prosecution. He has pleaded guilty to [details of the offence] and is awaiting sentence. Following his arrest and interview A made a written agreement under which he agreed to assist the prosecution to bring his co-accused to trial. That agreement has culminated in him giving evidence implicating the defendant …. .

The sentencing court will decide whether and, if so, to what extent A’s sentence should be reduced in return for his assistance in bringing others to justice. It follows that A has a powerful incentive to give evidence in this case. This is a feature of A’s circumstances which is plainly relevant to your consideration of his evidence. The defence case is that A has lied to improve his own position. He has a motive to implicate the defendant and he has done it without regard to the truth. On the other hand, the prosecution has submitted that A has a compelling incentive to tell the truth. If he fails to tell the whole truth, he is likely to be exposed and he will not obtain the fruits of his co-operation. Whenever a witness has an advantage to gain by giving evidence it is necessary to examine his evidence with particular care. The issue here is whether A’s evidence is tainted by a desire to save his own skin, irrespective of the truth of what he says, or he is motivated by a desire to make full disclosure of his wrongdoing in return for a more lenient sentence. Ultimately, the question for you to resolve is whether you are sure A has told you the truth about the involvement of the defendant. You may not find it possible to reach a concluded view upon exactly what motivated A to co-operate as he did and you do not have to, provided that you bear well in mind the risk that his evidence presents. A witness with a purpose of his own to serve may tell lies or he may tell the truth. In deciding whether A has told the truth you should consider not only what he said but the other evidence in the case. Where you find support for A’s
\end{quote}

\(^{62}\) See ch 8 (hearsay evidence) and ch 17 (Article 6 ECHR and the development of criminal evidential rules in Europe).

\(^{63}\) Criminal Justice and Public Order Act 1994 s 32(1).

\(^{64}\) \textit{Crown Court Bench Book} ch 9, p 159.
evidence from other sources you may be the more disposed to accept what he said... You are entitled to act on A’s evidence whether it is independently supported or not, provided that you have regard to the need for caution.

In Australia, s 165(1)(d) of the Evidence Act 1995 provides that evidence which may be unreliable includes evidence given in a criminal proceeding “by a witness who might reasonably be supposed to have been criminally concerned in the events giving rise to the proceeding”. This includes a witness who would be referred to as “an accomplice”, at common law. The NSW Court of Criminal Appeal has, however, stated that it may be preferable for trial judges to avoid using the term “accomplice” when instructing juries, since its use may give the impression that the judge believes that the witness is in fact an accomplice of the accused and therefore, that the judge has decided that the accused is guilty. In such cases, the trial judge may warn the jury that:

the courts have, over the years, accumulated a great deal of experience concerning the reliability of evidence given by a witness who might reasonably be supposed to have been criminally concerned in the events giving rise to the proceedings before the court and that experience would not readily be known to general members of the public. That experience has shown that the evidence given by such a witness is often unreliable. I do not intend to suggest, however, that such evidence is always unreliable. My purpose in giving you these directions is only to warn you that the evidence of such a witness may be unreliable and for that reason alone, you must approach that evidence with considerable caution in the way in which I will outline shortly.

There are, no doubt, many reasons why the evidence of such a person may be unreliable. Possible reasons are:

It is only natural, you may think, that a witness who might reasonably be supposed to have been criminally concerned in the events giving rise to the proceedings may want to shift the blame from himself or herself onto others, and to justify his or her own conduct. In the process, the witness may construct untruthful stories, which tend to play down his or her own part in the crime and play up the part of others in the crime, even going so far as to blame quite innocent people.

Persons reasonably supposed to be involved in the commission of an offence may make false claims as to the involvement of others out of motives of revenge or a feeling of dislike or hostility.

Such a person may be motivated to give false evidence in order to qualify for a reduction in his or her own sentence. [Where a discount has already been granted, as is the normal case, the jury should be specifically directed as to the precise extent of the discount and the consequences of failing to give evidence in accordance with his or her undertaking – see bracketed paragraph below.]

There may be reasons why false evidence has been given by such a witness, and it is not for the accused to establish the reason or reasons why the witness was lying.

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Experience has shown that once such a witness has given a version to the police inculpating an accused, he or she may feel locked into that version, even if it contained inaccuracies or even if it were substantially untrue.

[Where appropriate:] Finally, in relation to the evidence of [the witness] a number of his/her motives for lying, or possibly lying were explored. You should bear in mind that there may be unknown motives, or motives which cannot be explored in cross-examination, for which [the witness] may have to lie.

[The relevant evidence relating to the alleged unreliability of the witness, should be identified for the benefit of the jury.]

When assessing the evidence of [the witness], you must remember the warnings and directions I have just given to you.

In Canada, it was held in the case of *R v Vetrovec* that trial judges have discretion to issue a “clear and sharp warning” to the jury about the testimony of certain “unsavoury” witnesses, and in Ireland a corroboration warning is mandatory for accomplice evidence. Accomplice evidence may be sufficient for conviction, even if it is the sole evidence, in the US Federal courts, but it may be difficult for a prosecutor to satisfy a jury that it is sufficient for them to find an accused guilty beyond a reasonable doubt. By contrast, corroboration of accomplice evidence is required in the State of New York: “a defendant may not be convicted of any crime upon the testimony of an accomplice unless it is supported by corroborative evidence tending to connect the defendant with the commission of that crime.” This may, however, be less of a safeguard than it first appears; the New York Court of Appeals has held that the corroborative evidence “need not be powerful in itself”. Thus it:

...need not show the commission of the crime; it need not show that the defendant was connected with the commission of the crime. It is enough if it tends to connect the defendant with the commission of the crime in such a way as may reasonably satisfy the jury that the accomplice is telling the truth.

The Court also referred to the “slim corroborative linkage to otherwise independently probative evidence from accomplices”. 

### 16.9 Identification evidence

A small number of jurisdictions are similar to Scotland in allowing for “dock” or “in-court” identification without there having been a positive pre-trial identification of the accused as the perpetrator. These are mainly inquisitorial systems (such as Austria and Germany) but also include Canada, and the US (both Federal and in New York). In Austria, this is an aspect of the “free proof” approach to evidence taken in that jurisdiction, where everything that is relevant can be used by the

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68 At 831.
69 *People v PJ* [2003] 3 IR 550.
judge in reaching the verdict. In the US, the justification for allowing in-court identification is said to be that:73

...the defense would be able to cross-examine the witness and bring out the fact that there was no prior identification and that the in-court identification might not be very reliable given the fact that everyone knows where the defendant sits in the courtroom.

The New York Courts’ Instructions of General Applicability: Identification provide a special warning in such cases, as does the Canadian Judicial Council’s Model Jury Instructions. According to the latter, trial judges should advise jurors:74

[Name of the Witness] identified [Name of the Accused] for the first time in the courtroom while [Name of the Accused] was sitting in the prisoner’s dock. This identification is entitled to little weight. This is because there is a danger that a witness will assume that the person sitting in the prisoner’s dock is the offender.

Furthermore:75

If you conclude that the in-dock identification is the only evidence of identification then it would be unsafe to convict [Name of the Accused].

In other jurisdictions, dock identification is not permitted unless there has been a positive identification prior to the trial, or there are good reasons why this could not be carried out (Australia, New Zealand). Thus section 114 of the NSW Evidence Act 1995 provides:

(2) Visual identification evidence adduced by the prosecutor is not admissible unless:
   (a) an identification parade that included the defendant was held before the identification was made, or
   (b) it would not have been reasonable to have held such a parade, or
   (c) the defendant refused to take part in such a parade,
   and the identification was made without the person who made it having been intentionally influenced to identify the defendant.

(3) Without limiting the matters that may be taken into account by the court in determining whether it was reasonable to hold an identification parade, it is to take into account:
   (a) the kind of offence, and the gravity of the offence, concerned, and
   (b) the importance of the evidence, and
   (c) the practicality of holding an identification parade having regard, among other things:
      (i) if the defendant failed to cooperate in the conduct of the parade-to the manner and extent of, and the reason (if any) for, the failure, and

73 See also United States v Causey, 834 F 2d 1277 (6th Cir 1987).
75 Section 11.24[8].
(ii) in any case to whether the identification was made at or about the time of the commission of the offence, and

(d) the appropriateness of holding an identification parade having regard, among other things, to the relationship (if any) between the defendant and the person who made the identification.

(4) It is presumed that it would not have been reasonable to have held an identification parade if it would have been unfair to the defendant for such a parade to have been held.

(5) If:

(a) the defendant refused to take part in an identification parade unless an Australian legal practitioner or legal counsel acting for the defendant, or another person chosen by the defendant, was present while it was being held, and

(b) there were, at the time when the parade was to have been conducted, reasonable grounds to believe that it was not reasonably practicable for such an Australian legal practitioner or legal counsel or person to be present,

it is presumed that it would not have been reasonable to have held an identification parade at that time.

(6) In determining whether it was reasonable to have held an identification parade, the court is not to take into account the availability of pictures or photographs that could be used in making identifications.

A warning to the jury about the dangers of some forms of identification evidence is mandatory in Australian, English, and Irish law, and also in New Zealand. To return to the NSW Evidence Act 1995, s 116 provides:

(1) If identification evidence has been admitted, the judge is to inform the jury:

(a) that there is a special need for caution before accepting identification evidence, and

(b) of the reasons for that need for caution, both generally and in the circumstances of the case.

(2) It is not necessary that a particular form of words be used in so informing the jury.

This is supplemented in the Bench Book by detailed directions:

There is an important direction I must now give you concerning the evidence of [name of witness] in which [he/she] identified [the accused] as the person who [insert circumstances ...]. In giving you these directions you should not think that I am giving you any indication of what I think about the reliability of the evidence. As I told you at the beginning of the trial that is not my task. My task is to make sure that you consider everything that is relevant to the assessment of the reliability of the evidence. That assessment is your function, not mine. Judges have an experience with the law that members of the community generally do not

76 Turnbull warning: see ch 5.
77 This is known as a Casey warning, from People v Casey (No 2) [1963] IR 33. This is also discussed further in ch 5.
78 Evidence Act 2006 s 126.
have. Judges know that identification evidence may be unreliable and there are a variety of reasons why that is so.

*Reasons for the need for caution — generally: s 116(1) Evidence Act 1995*

Evidence that [the accused] has been identified by a witness must be approached by you with special caution before you accept it as reliable. These directions relate only to the reliability of the identification evidence given, not to the honesty of the witness[es]. A witness may be honest but that does not necessarily mean that the witness will give reliable evidence. Because the witness who gives evidence of identification honestly and sincerely believes that [his/her] evidence is correct, that evidence will usually be quite impressive, even persuasive. So here, even if you thought [name of witness] was entirely honest in the evidence that [he/she] gave, you must still approach the task of assessing the reliability of [his/her] evidence with special caution.

So, special caution is necessary before accepting identification evidence because of the possibility that a witness may be mistaken in their identification of a person accused of a crime. The experience of the criminal courts over the years, both here in Australia and overseas, has demonstrated that identification evidence may turn out to be unreliable. There have been some notorious cases over the years in which evidence of identification has been demonstrated to be wrong after innocent people have been convicted.

You must carefully consider the circumstances in which [name of witness] made [his/her] observation of the person. The circumstances in which the witness made [his/her] observation of the person can affect the reliability of identification evidence.

*Special need for caution before accepting identification evidence in the circumstances of the case: s 116(1)(b) Evidence Act 1995*

There are a number of matters that have been specifically raised in this case that require your consideration.

[The trial judge should identify for the jury the particular matters in the case and make brief reference to the arguments in relation to each of them. The following matters are given by way of example and would need to be adapted to the circumstances of the individual case. In most cases the jury would be assisted by the judge providing the answer to the question posed.]

Was the person identified a stranger to [name of witness]? It is obviously harder to identify strangers than it is to identify people who are well known to us. [recite evidence]

What opportunity did [name of witness] have to make [his/her] observation of the person? [Name of witness] said the period of observation [he/she] had was ... [recite evidence].

Did the witness focus [his/her] attention on the person or was it just a casual sighting that did not have any significance for the witness at the time? [recite evidence]

In what light was it made? You have heard evidence from [name of witness] about the light at the time of the alleged offence [recite evidence — for example, poor/bright, etc].
Was there anything about the person observed which would have impressed itself upon the witness? In other words, was there anything distinctive about the person? [recite evidence — for example, tattoo, albino, etc]

Was there any special reason for remembering the person observed?

Was the witness under any stress or pressure at the time? For example, if a person is woken up suddenly or hit in the face. If [name of witness] is under any stress or pressure at the time, how do you think that might have affected [his/her] ability to accurately observe the person and store the image of the person’s appearance in [his/her] memory?

Does [name of witness] come from the same racial background as the person identified? That is also something you can bear in mind. It may be more difficult for a member of one race to identify an individual of another racial group. [recite evidence]

When was [name of witness] first asked for a description of the person and how fresh would [his/her] memory have been at that time?

How did the description given by [name of witness] compare with the appearance of [the accused]?

How long was it between the sighting of the person and the giving of the description to the time that [name of witness] identified [the accused]?

You must give consideration to each of those matters. Any one of those circumstances may possibly lead to error.

[Reference may then be made, if thought appropriate, to any other matters raised by counsel upon this issue that have not already been the subject of the direction required by the statute.]

[Where recognition evidence is adduced, add]

In this case the evidence of [name of witness] is that [he/she] recognised someone that [he/she] knew. [summarise circumstances if appropriate] It is perhaps easier to understand the possibility of error when the evidence is given by someone who has not previously known [the accused], but errors may also occur even when the witness has previously known [the accused]. Mistakes have been known to be made by friends and even by relatives of a person who thought that it was their friend or relative whom they had seen. This is something you should bear in mind. Just because a witness claims to have known the person, there remains a possibility of mistake.

[Where more than one witness has given identification evidence, add]

In this case more than one witness has identified [the accused]. This is a matter that you may take into account in determining how strong the evidence is. However, this does not mean that there is necessarily less chance that a mistake has been made. Two or more honest witnesses can be just as mistaken as one.

Conclusion — the directions are not my personal view

What I have done is to tell you about the need for special caution in coming to your decision about whether you accept the identification evidence. There is this need for special caution.
because of the potential unreliability of the evidence and I have told you the reasons why that might be so. I want you to clearly understand this so that you can make your decision about the reliability of the evidence by taking into account all of the matters that are relevant to that task.

I repeat that I have not been expressing any personal views about the evidence. I have not been giving you any hints about how I think you should decide this case. My task, as I have told you, is limited to giving you the legal directions that you have to comply with to ensure that [the accused] receives a fair trial.

In Ireland, formal pre-trial identification parades are regarded as best practice. According to the Irish Court of Criminal Appeal:80

... where the conviction of a person is wholly or substantially dependent on visual evidence, such evidence should have resulted from a formal identification parade unless the Director of Public Prosecutions and gardaí [Irish police] can satisfy the court that the explanation for the alternative source of such evidence is objectively justified. In other words, the onus is on the prosecution to show why second best, in the particular circumstances, is the best available. This requirement reflects the oft recited nature of visual identification evidence and the court’s duty to ensure that where relied upon, the best possible method has been utilised so as to obtain it. It will only be in the rarest of cases that the court, in the absence of objective justification, will consider secondary evidence: when available for consideration the procedures appropriate to the method used must satisfy the normal rules.

Similarly, in New Zealand, if there has been no formal pre-trial identification procedure and there is “no good reason” for this, then any identification evidence is inadmissible “unless the prosecution proves beyond reasonable doubt that the circumstances in which the identification was made have produced a reliable identification”.81

As explained in chapter 5, there is no correlation between the confidence of a witness in his or her identification of the accused, at trial, and the accuracy of that identification. Since this is counter-intuitive, the Canadian Judicial Council’s Model Jury Instructions suggests that jurors should be told about this:82

There is little connection between great confidence of the witness and the accuracy of the identification. Even a very confident witness may be honestly mistaken. A very confident witness may be entirely wrong with respect to his or her identification evidence.

Expert evidence on the dangers of some forms of eyewitness evidence is permitted in Australia, with leave of the court.83 The common law rule which still operates in Scotland – that expert evidence is inadmissible on matters which are regarded as “common knowledge” – has been abolished in

80 DPP v Beroket Mekonnen [2011] 1 ECCA 74 per McKechnie J. The accused, a black man, was identified by a witness while standing in the queue for the Limerick bus.
81 Evidence Act 2006 (NZ) s 45.
83 Evidence Act 1995 s 108C. For an application of this in relation to eyewitness expert evidence, see Dupas [2012] VSCA 328. Note, however, that there is still a requirement that the expert evidence be substantially based on the witness’s specialised knowledge, so there continue to be cases where a court will exclude putative expert evidence on the basis that the witness is adding nothing to what the jury could infer for itself.
Australia. In Canada, expert evidence is only admissible on issues which are outside the expertise of the trier of fact, and the courts have held that eyewitness identification is within the realm of jurors’ normal experience, thus expert evidence is not required. Canadian law relies instead on the judge’s charge to the jury to highlight the dangers inherent in such evidence. It has, however, been suggested that expert evidence could be admissible where the prosecution’s case is based on the evidence of just one eyewitness. Expert evidence on eyewitness identification is regarded as inadmissible in English and Irish law. In contrast to this, it has been recognised by the New York courts that “it cannot be said that psychological studies regarding the accuracy of an identification are within the ken of the typical juror”.

16.10 Confession evidence

In some countries (for example Germany) a conviction may be based on the accused’s confession alone. Confession evidence is, however, regarded as problematic in many jurisdictions, and in New York and South Africa, for example, corroboration of confessions is generally required. However, in New York this means that there must be independent evidence that a crime was committed, rather than corroboration that the accused was the person who committed it. In New Zealand, while a confession can be sufficient evidence per se, a judge may decide to give a jury a warning of the “need for caution” in deciding “whether to accept the evidence” and “the weight to be given to the evidence”.

Some countries require police interviews to be audio or video-recorded; in many others, this is the usual practice. The benefits of such recordings have been well described by the Canadian Supreme Court:

First, it provides a means by which courts can monitor interrogation practices and thereby enforce the other safeguards [i.e. the right to remain silent; the right to legal assistance]. Second, it deters the police from employing interrogation methods likely to lead to untrustworthy confessions. Third, it enables courts to make more informed judgments about whether interrogation practices were likely to lead to an untrustworthy confession. Finally, mandating this safeguard accords with sound public policy because the safeguard will have the additional salutary effects besides reducing untrustworthy confessions, including more net benefits for law enforcement.

Although recording of confessions is not required by legislation in Canada, a failure to use video recording equipment when this was readily available renders suspect any confession. In England, if

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84 Evidence Act 1995 s 80.
85 R v McIntosh (1997) 117 CCC (3d) 385 (Ont CA); R v Maragh [2003] OJ No 3575 (SCI); R v DD (2000) 148 CCC (3d) 41 (SCC).
86 R v Miaponoose (1996) 110 CCC (3d) 445 (Ont CA).
88 Criminal Procedure Law s 60.50. See also People v Lytton 257 NY 310, 310 (1931), in which it was explained that the law is designed to protect against “the danger that a crime may be confessed when no such crime in any degree has been committed by anyone”.
89 Evidence Act 2006 s 122(1) (a) and (b). No particular form of words is required: s 122(4).
a suspect is alleged to have made an oral admission before interview, the making of the admission must be put to him/her in interview, and the suspect asked to confirm it on tape.

TABLES

| TABLE 1 |
|-----------------|---------------------------------|
| **Does your jurisdiction have a test of “sufficiency of evidence”, “reasonable possibility of conviction”, or something similar, which the prosecuting authorities are required to satisfy before prosecuting a case?** | **AUSTRALIA (NSW)** |

The general public interest is the paramount criterion. The question whether or not the public interest requires that a matter be prosecuted is resolved by determining whether or not: (1) the admissible evidence available is capable of establishing each element of the offence; (2) there is no reasonable prospect of conviction by a reasonable jury (or other tribunal of fact) properly instructed as to the law; and if not (3) discretionary factors nevertheless dictate that the matter should not proceed in the public interest.

Source: Prosecutors’ code (provision is made for the guidelines in the Director of Public Prosecutions Act 1986 (NSW) s 13, but these do not have legislative force).

| **AUSTRIA** | **YES** |

The prosecuting authorities must bring a case to trial if conviction seems likely. There is no discretion (apart from diversion, which is mandatory as well if the requirements are met). Once the prosecutor has filed the case in court, the judge has to look at the prosecutor’s “charging paper” and can refer it back to the prosecutor if the paper is formally insufficient (lacking the requirements listed in the code) or if the judge feels that the circumstances of the case are not sufficiently clear yet.


| **CANADA** | **YES** |

The prosecution should not take a case if there is no reasonable possibility of conviction. There are preliminary hearings at which the case is assessed by a judge prior to trial.

Source: USA v Sheppard [1977] 2 SCR 1067

| **ENGLAND** | **YES** |

The Crown Prosecution Service applies two criteria in deciding whether to prosecute. The first is a test of whether the available and admissible evidence is sufficient for there to be a realistic prospect of conviction. This means that a reasonable jury or bench of magistrates or judge, properly directed and applying the law, would be more likely than not to convict. This is sometimes called the 51% rule. The test is objective, in the sense that it does not take account of the point that historically conviction rates for some offences have tended to be low. The second criterion is that a prosecution must be in the public interest. If the evidential criterion is satisfied it will usually be in the public interest to
prosecute where the offence is one of any seriousness.

Source: The criteria are in the form of guidelines contained in the Code for Crown Prosecutors (2013 ed), issued pursuant to the Prosecution of Offences Act 1985 s 10. A failure to apply the guidelines set out in the Code is open to legal challenge.

**GERMANY**  YES

The prosecutor shall file an accusation if the investigation gives “sufficient reason” for doing so. The courts have interpreted this as a high probability that the defendant will be found guilty at trial.

Source: German Code of Criminal Procedure (CCP) § 170.

**IRELAND**  YES

There are 3 questions: 1. Is there a *prima facie* case? This requires “admissible, substantial and reliable evidence that a criminal offence has been committed by the suspect. The evidence must be such that a jury, properly instructed on the relevant law, could conclude beyond a reasonable doubt that the accused was guilty of the offence charged. 2. If so, is there a reasonable prospect of conviction? A prosecution should not be brought where the likelihood of a conviction is effectively non-existent. Where the likelihood of conviction is low, other factors, including the seriousness of the offence, may come into play in deciding whether to prosecute. 3. If so, does the public interest require a prosecution?

Source: Chapter 4 of the DPP’s *Guidelines for Prosecutors*

**ITALY**  YES

The prosecutor prosecutes a case if there are “sufficient elements to support the prosecution before the court”.

Source: Criminal Procedure Code, art 125.

**NETHERLANDS**  YES

This test does not stand on its own, but is done in anticipation of a later court decision on sufficiency of evidence. The Public Prosecution Service may only prosecute cases in which there is (theoretically) enough evidence for a conviction by the court. Thus, the PPS assesses the evidence by the same legal standards as the court.

Source: This “attainability test” (as it is called) is not prescribed in legislation, but is part of the PP’s position as the leader of the police investigation, responsible for evidence gathering, and as the sole institution that can bring cases to court.

**NEW ZEALAND**  YES

Prosecutions ought to be initiated or continued only where the prosecutor is satisfied that the Test for Prosecution is met, namely: The evidence which can be adduced in Court is sufficient to provide a reasonable prospect of conviction (the Evidential Test); and that prosecution is required in the public interest (the Public Interest Test).

Source: Solicitor-General’s Prosecution Guidelines (2013)
<table>
<thead>
<tr>
<th>Country</th>
<th>Yes/No</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>NORWAY</td>
<td>YES</td>
<td>A criminal investigation shall be carried out when as a result of a report or other circumstances there are reasonable grounds to inquire whether any criminal matter requiring prosecution by the public authorities subsists. To institute a prosecution, however, the prosecuting authority is bound by the same evidential requirement as the court, i.e. evidence “beyond a reasonable doubt”. The major difference between the assessment of evidence for the prosecuting authority and the court is the fact that the prosecuting authority relies on written, not oral, evidence. Source: Act of 22 May 1981 No. 25, The Criminal Procedure Act, s 224; the evidential requirement to institute a prosecution for the prosecuting authority is based on practice.</td>
</tr>
<tr>
<td>SOUTH AFRICA</td>
<td>YES</td>
<td>The prosecution has a wide discretion, but there should be sufficient evidence to provide a reasonable prospect of a conviction. Source: The “test” is from case law and the Code of Conduct for prosecutors formulated under s 22(6) of the National Prosecuting Authority Act 32 of 1988.</td>
</tr>
<tr>
<td>SWEDEN</td>
<td>YES</td>
<td>Not a test per se. The prosecutor’s office must decide whether they may expect a conviction on the evidence presented. Source: Article 324 of the Swiss Criminal Procedure Code.</td>
</tr>
<tr>
<td>SWITZERLAND</td>
<td>YES</td>
<td>The prosecution is required to issue an indictment if there is “sufficient reason to suspect” the accused of having committed the offence. This has been interpreted as meaning that the prosecution must issue an indictment if it considers it likely that the court will convict the accused. If there is doubt about whether this test has been satisfied, the prosecution is obliged to issue the indictment in order to allow the court to rule on the matter (in dubio pro dubiore). Source: Article 324 of the Swiss Criminal Procedure Code.</td>
</tr>
<tr>
<td>USA</td>
<td>YES</td>
<td>There must be both admissible and sufficient evidence to establish probable cause to believe the offence was committed by the defendant. Source: NY Criminal Procedure Law § 190.65(1)</td>
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<tr>
<td>(NEW YORK)</td>
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<tr>
<td>USA</td>
<td>YES</td>
<td>To prosecute a case, a federal prosecutor must seek an indictment before a grand jury. To obtain the indictment, the prosecutor must demonstrate “probable cause” to believe a crime was committed and that the suspect committed it. There is no precise agreement on the percentage of proof that equals “probable cause,” but it tends to mean “more likely than not” and some would quantify the amount of proof as somewhere between 60 and 70%. Source: The 4th Amendment to the US Constitution prohibits the police from arresting suspects unless they have probable cause to believe the suspect committed an offence.</td>
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</table>
## TABLE 2

Is there any other test or evidential requirement that your courts apply in determining guilt?

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<tr>
<th>COUNTRY</th>
<th>ANSWER</th>
<th>DETAILS</th>
</tr>
</thead>
<tbody>
<tr>
<td>AUSTRALIA (NSW)</td>
<td>YES</td>
<td>Guilt must be proven beyond reasonable doubt for conviction. Trial judges are generally discouraged from elaborating on this expression, however Victoria has sought to adopt a more modern approach with its jury direction innovations.</td>
</tr>
<tr>
<td>AUSTRIA</td>
<td>NO</td>
<td>The judge (jury) has to be convinced of the defendant’s guilt. The principle of free evaluation of evidence allows the judge (jury) to weigh all evidence and decide on the value of this evidence, so it is a subjective conviction. To allow some sort of control, the judges are required to reason their verdicts, especially their evaluation of all the pieces of evidence. The have to explain why they consider the pieces of evidence believable or not. This does not apply to jury verdicts though. The (real) jury is not required to reason the verdict. If the judge has doubts about the defendant’s guilt he or she has to acquit following the <em>in dubio pro reo</em> principle.</td>
</tr>
<tr>
<td>CANADA</td>
<td>YES</td>
<td>Proof beyond reasonable doubt, as explained to the jury in See <em>R v Lifchus</em> [1997] 3 SCR 320. Where there is only one witness, special instructions are given: <em>R v W (D)</em> [1991] 1 SCR 742</td>
</tr>
<tr>
<td>ENGLAND</td>
<td>YES</td>
<td>The standard of proof in a criminal trial is that the court must be “sure” of the defendant’s guilt. This has largely replaced the traditional test of proof “beyond reasonable doubt”. There is no general requirement in English law of corroboration of prosecution evidence, although the presence or absence of corroboration may affect the admissibility of certain evidence, such as hearsay or anonymous witness evidence, if the court takes the view that the admission of the evidence would infringe the right to a fair trial under Art 6 of the ECHR or would otherwise be unfair or not in the interests of justice.</td>
</tr>
<tr>
<td>GERMANY</td>
<td>YES</td>
<td>A court will convict the defendant if it is convinced of his guilt. This presupposes a subjective conviction on the part of the judges as well as sufficient evidence to remove any reasonable doubt as to the defendant’s guilt. The court prepares an extensive written judgment in which it spells out the evidence that has convinced the court that the defendant is guilty.</td>
</tr>
<tr>
<td>IRELAND</td>
<td>YES</td>
<td>The Irish courts operate a mixed system of mandatory and discretionary corroboration requirements in relation to a number of offences. In respect of the common law offence of perjury,</td>
</tr>
</tbody>
</table>
Corroborative evidence is mandatory. In respect of accomplice evidence a corroboration warning is mandatory.

In respect of a range of sexual offences a corroboration warning is discretionary.

**ITALY**  YES

A person can be convicted if he appears to be guilty “beyond any reasonable doubt”.

**NETHERLANDS**  YES

The general requirements for a conviction are:

1. The evidence has to be “legal”, which means that it should be possible to list every piece of evidence that is used to ground a conviction under the statutory forms of evidence (such as: witness statements, statements by the accused, official reports by the police, other documents)

2. the legal evidence produced at trial must have convinced the court that the accused has committed the criminal offence

This very unspecific regulation leaves the court much discretion in deciding which evidence is used and how much evidence it needs. In addition, however, there are statutory rules as to the minimum evidence required for a conviction: the court may not convict the accused on the basis of his/ her own statement only; the court may not convict the accused on the basis of one witness statement only; the court may not convict an accused solely or decisively based on anonymous witness statements; the court may convict an accused solely on the basis of statements by witnesses who have agreed with the public prosecutor to testify against another accused in exchange for an application for sentence reduction in their own case. The court may however convict an accused solely on the basis of an official report by a police officer.

All of these minimum evidence rules have been interpreted and further developed in case law.

**NEW ZEALAND**  YES

Proof beyond reasonable doubt.

**NORWAY**  YES

Proof “beyond a reasonable doubt”, and the *in dubio pro reo* maxim enshrined in the European Convention of Human Rights article 6(2).

**SOUTH AFRICA**  YES

Guilt must be proved beyond a reasonable doubt.

**SWEDEN**  ?

The question confuses the standard of proof that declares on the prosecutability of the suspect with the standard of proof that declares on the guilt of the accused.

**SWITZERLAND**  YES

The court must be convinced to a degree described as “almost absolute certainty” that the accused committed the criminal offence. Also of importance in this context is the principle of the free evaluation of proof; evaluation of evidence is a matter for the
judge and should not be regulated by fixed rules of evidence.

USA YES
(NEW YORK)

To establish guilt in federal and state courts, the prosecution must prove guilt beyond a reasonable doubt. This requirement is established by the due process clause of the United States Constitution, XIV Amendment, and by the New York state constitution.

USA (FEDERAL) YES

As above.
**TABLE 3**

Following a conviction, does your jurisdiction have a mechanism by which an appeal may be allowed/conviction quashed if the appeal court takes the view that the evidence at the trial was insufficient, or insufficiently strong, to warrant conviction?

<table>
<thead>
<tr>
<th>COUNTRY</th>
<th>ANSWER</th>
<th>DETAILS</th>
</tr>
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<tbody>
<tr>
<td>AUSTRALIA (NSW)</td>
<td>YES</td>
<td>The formula in the common form provision is that the verdict is ‘is unreasonable, or cannot be supported, having regard to the evidence.” In practice this seems to mean that the appeal court will overturn a conviction in very limited circumstances – where the appeal court takes the view that it was not open to a reasonable jury to find guilt proven beyond reasonable doubt. While Australian courts view the jury verdict with a deferential attitude, overturning convictions happens fairly regularly. A survey of NSW Court of Criminal Appeal cases covering the period 2001 to 2007 found 65 out of 315 successful appeals were of this variety, making up 20.5 per cent of the total.</td>
</tr>
<tr>
<td>AUSTRIA</td>
<td>YES</td>
<td>This depends on the seriousness of the offence committed and the court hearing the case. Less serious crimes are heard by a single professional judge and the appeal court can look at the facts of the case and hear new evidence. In those cases a new evaluation of evidence by the appeals court can take place. More serious crimes fall under the jurisdiction of the Regional Court as a mixed jury (one professional and two lay judges) and the most serious crimes also fall under the jurisdiction of the Regional Court as a jury (8 lay judges, who decide independently upon guilt or innocence and 3 professional judges, who “direct” the trial). In both cases the appeals possibilities are more limited. In mixed jury cases the evaluation of the evidence has to be reasoned in the verdict. An appeal is possible if this reasoning is insufficient or in contradiction. This appeal is not available in (real) jury cases though, because they don’t have to reason their verdict. There is an appeal available in mixed jury and (real) jury cases which deals with the content of the case file and the findings of the court: If the reasonable person looking at the content of the case file (which contains all the evidence presented at trial) has serious doubts about the factual findings of the court, the verdict has to be set aside. The Supreme Court interprets this provision very narrowly though, as it is not a second trier of facts and cannot hear new evidence.</td>
</tr>
<tr>
<td>CANADA</td>
<td>YES</td>
<td>If the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence.</td>
</tr>
<tr>
<td>ENGLAND</td>
<td>YES</td>
<td>An appeal to the Crown Court against conviction by a magistrates’ court takes the form of a rehearing of the case and there will be a</td>
</tr>
</tbody>
</table>
new verdict according to the evidence adduced at the rehearing. An appeal to the Court of Appeal against conviction in the Crown Court on trial on indictment may be brought, with leave, on the ground that the conviction is unsafe. In deciding on the safety of the conviction the Court of Appeal will in general act only as a court of review and will not second guess the verdict of a jury. However, the defendant may argue as a ground of appeal that there was insufficient evidence for the trial judge to leave the case to the jury. In rare and exceptional cases the Court of Appeal has quashed a conviction because the court has a “lurking doubt” about its safety. There is provision in the Criminal Appeal Act 1968 s 23 for the Court of Appeal to receive fresh evidence when hearing an appeal against conviction. If fresh evidence is received the Court of Appeal will then decide whether in its view the effect of the fresh evidence is to render the conviction safe or unsafe.

**GERMANY** YES

It is for the trial court to form its opinion on guilt based on the evidence at the trial. Since the appeals court is not taking evidence it will not second-guess the trial court’s findings, however, it closely reviews the trial court’s written judgment. If the appeals court finds that the trial court’s reasoning violates the laws of logic or runs counter to common experience, or if the trial court has overlooked “evident” gaps in the evidence, the appeals court will reverse the judgment and order a new trial.

**IRELAND** YES

Criminal Procedure Act 1993, s 3: court may affirm or quash a conviction.

**ITALY** YES

The test is based on the criterion of “reasonable doubt” but the appeal court is free to give a different evaluation of the evidence than that given by the first instance court.

**NETHERLANDS** YES

As a general rule, any final decision by the first instance court, be it a conviction or an acquittal, can be appealed against.

However, appeal against decisions in cases of minor offences (fine not exceeding 50 euros), is not possible. There is no general leave to appeal system, but if the accused has been found guilty of a criminal offence for which there is a statutory maximum sentence of four years imprisonment/fine not exceeding 500 euros, the president of the Court of Appeal will assess whether the interests of justice require that the case will be considered by the Court of Appeal. Only then an appeal trial is scheduled.

The assessment of the interests of justice necessarily entails an assessment of the evidence on which the first instance court based its conviction and therefore implies that the court of appeal takes a preliminary stance as to the sufficiency of the evidence. This system
does not apply in cases of more serious offences. In all cases, only after the trial before the Court of Appeal has been closed, the Court of Appeal will bindingly decide whether the evidence adduced there is sufficiently strong.

**NEW ZEALAND**  **YES**
The first appeal court must allow a first appeal if satisfied that (a) in the case of a jury trial, having regard to the evidence, the jury’s verdict was unreasonable; or (b) in the case of a Judge-alone trial, the Judge erred in his or her assessment of the evidence to such an extent that a miscarriage of justice has occurred; or (c) in any case, a miscarriage of justice has occurred for any reason. A miscarriage of justice means any error, irregularity, or occurrence in or in relation to or affecting the trial that has created a real risk that the outcome of the trial was affected; or has resulted in an unfair trial or a trial that was a nullity.

**NORWAY**  **YES**
An error in the assessment of evidence in relation to the issue of guilt can always be a ground of appeal from the District court to the Appellate court. If the Appeal Court finds that the evidence is not sufficient to establish guilt beyond reasonable doubt, the result will be acquittal in the Appeal Court – but this of course follows from a full review of the case.

**SOUTH AFRICA**  **YES**
The appeal court can allow an appeal if it thinks that the judgment of the trial court should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a failure of justice. Where a conviction is set aside on the ground that a failure of justice has resulted from the admission of evidence otherwise admissible but not properly placed before the trial court by reason of some defect in the proceedings, the appeal court may remit the case to the trial court to deal with any matter, including the hearing of such evidence, in such manner as the court of appeal may think fit.

**SWEDEN**  **NO**

**SWITZERLAND**  **YES**
The Swiss legal system allows for a full appeal on both facts and law. The test to be applied is the same as that at first instance. There is a further (restricted) appeal to the Federal Supreme Court on matters of law and in the context of arbitrariness. In addition there is potential for a re-trial if new facts which occurred before the decision was made or new evidence has come to light which have the potential to call into question the conviction; a subsequent criminal judgment contradicts an earlier one; the outcome of the earlier proceedings was influenced by criminal activity; or the ECtHR has found a violation of the ECHR and only a re-trial can remedy the violation.
If the trial evidence was not legally sufficient to establish the defendant’s guilt of an offence of which he was convicted. However, the intermediate appellate courts in New York have much greater power to reverse a conviction than the trial courts, including the right to determine whether the verdict is against the weight of the evidence. The U.S. Supreme Court and the New York Court of Appeals may only reverse a conviction if the evidence is legally insufficient but not if it is against the weight of the evidence.

Defendants who are convicted of crimes may appeal those convictions on the grounds of “insufficiency of the evidence” – basically a way of saying that the prosecutor did not meet its burden of overcoming the presumption of innocence and proving guilt beyond a reasonable doubt.

An appeals court typically will apply the following test to judge such claims: whether, after viewing the evidence in the light most favourable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.
### TABLE 4

**Types of evidence**

<table>
<thead>
<tr>
<th>Evidence which can be sufficient per se for a prosecution</th>
<th>A</th>
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**Hearsay, where eyewitness has died prior to trial?**

| | √ | √ | √ | X | √ | X | √ | X | 1 | √ | X | 1 | X | √ | √ | X | 1 |

**Written statement from eyewitness who is now deceased?**

| | √ | √ | √ | X | √ | X | √ | X | 1 | √ | X | 1 | X | ? | 1 | X | X |

**Evidence from the complainer in a case of alleged rape or assault?**

| | √ | √ | √ | √ | √ | X | 1 | X | 1 | X | X | ? | 2 | √ | √ | √ | √ |

**Evidence of an accomplice who has pled guilty**

| | √ | √ | √ | 2 | X | 1 | X | 2 | X | X | 2 | X | 2 | 2 | X | X | X |

**Police testimony that eyewitness gave a positive ID of suspect**

| | √ | √ | √ | 2 | | | | | | | | | | | | | | |

**Evidence which could be sufficient per se for conviction**

| | √ | √ | √ | | | | | | | | | | | | | | | | |

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*Post-Corroboration Safeguards Review: Report of the Academic Expert Group*
Evidence from the complainer in a case of alleged rape or assault?

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<thead>
<tr>
<th>Types of supporting evidence</th>
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<td>Hearsay evidence from a doctor that complainer said she was assaulted by her spouse</td>
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<td>Evidence from a third party that complainer had injuries on day following alleged assault</td>
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**AUSTRALIA (NSW)**
1. But none of this supporting evidence is essential.

**CANADA**
1. But there may need to be physical evidence corroborating the hearsay statement.
2. Where a witness has overwhelming credibility problems, a warning may be necessary.
3. But since the complainer’s evidence is sufficient per se, none of this supporting evidence is necessary.
ENGLAND

1. Hearsay statements are admissible for the prosecution so in theory the prosecution could take a case, but in practice this would probably not happen. The hearsay statement is the sole evidence for the prosecution and a trial judge is likely to feel obliged to exclude it in the exercise of discretion under s 78 of the Police and Criminal Evidence Act 1984 (PACE). This is because the accused will have to challenge the identification if he is to have any defence, but he will have no opportunity to cross-examine the witness on the accuracy of his identification, or on whether the latter deliberately incriminated D falsely. In those circumstances there would be a probable violation of Art 6(1) and (3d) of the ECHR. In applying the evidential test mentioned above the CPS must take account of the admissibility of the evidence and therefore of the likelihood that it will be excluded.

2. The accomplice’s evidence alone would be sufficient to take a case provided the prosecutor was satisfied that s/he was a credible and reliable witness and had no apparent motive to incriminate the accused falsely. The judge has discretion whether to give a warning to the jury. The terms of any warning will depend on the circumstances of the case and the nature of any attack made on the credibility of the accomplice. If the judge forms the impression that the accomplice is not a credible or reliable witness, s/he can withdraw the case from the jury/direct the jury to acquit. If the accomplice is of bad character/several previous convictions, the accused could apply to the trial judge for leave to adduce these in evidence as relevant to credibility. The accomplice could also be asked about any previous inconsistent statements she had made.

3. The complainant’s testimony would be sufficient for the prosecution to bring a case, and the DPP has recently affirmed the importance of taking forward credible complaints of sexual offences. Having said that, it is only common sense that a prosecutor would look for some support for the evidence of the complainant. The trial judge retains a discretion to give a warning in such cases. In cases of alleged historic sex abuse it will often be desirable, although it is not mandatory, for the judge to give the jury a direction as to possible difficulties the defence faces as a result of the delay. In cases where the judge takes the view that it would be impossible for the defendant to receive a fair trial the judge should stop the prosecution as an abuse of process, but this is an exceptional step.

4. Support for a complainant’s testimony is not necessary, but is likely to be looked for in practice. The evidence of the scratch is weak support for her complaint of rape. If the accused’s defence is that they had sex, but it was consensual, he might seek to explain the scratch as something that occurred in the throes of passion.

5. Evidence of distress at or about the time of the alleged offence could provide support for [a complainant’s] testimony, but its weight will vary. There is no rule regarding the time interval between intercourse and distress (or between intercourse and the making of a complaint). However, the longer the time interval the weaker will be the evidence of distress. In an appropriate case the judge may need to alert the jury to the risk that the distress might have been feigned.

GERMANY

1. The answer depends on how credible and detailed the alleged accomplice’s description of D’s involvement is. The police would, in any event, first invite D to comment on these allegations, and it would depend on D’s reaction whether charges are brought against him. A court would closely examine the accomplice’s interest in involving D and on that basis assess the credibility of the allegations. If there
is no objective evidence supporting D’s involvement he is very unlikely to be convicted, even if he remains silent.

2. A witness’s spontaneous identification of D could be sufficient for a court to convict, regardless of whether it is introduced by direct or hearsay evidence. But if the eyewitness/primary witness looking at the defendant in court says that she is unable to identify him as the perpetrator, that would probably weaken her first identification so much that the court would not convict D.

IRELAND

1. A discretionary warning must be given to the jury by the trial judge in such cases. If the trial judge forms the impression that the complainant is not a credible or reliable witness, s/he can direct the jury to acquit. See People (DPP) v Davis [1993] 2 IR 1 at 13.

2. Theoretically yes, but in all likelihood, no. The uncorroborated evidence of an accomplice is, in itself, admissible. Once properly warned, a jury may convict notwithstanding the absence of corroboration. However, the judge would give a warning regarding the dangers of convicting on the uncorroborated evidence of an accomplice. Accordingly, in all likelihood, such evidence would fail to reach the standard of sufficiency for prosecution. Further, if the trial judge forms the impression that the accomplice is not a credible or reliable witness, s/he can direct the jury to acquit.

3. The suspect could/would be asked to account for the mark on his person (with a special warning regarding adverse inferences from his failure to give an account for same). The adverse inference in and of itself could not be the sole grounds for conviction, pursuant to s 18 of the Criminal Justice Act 1984.

4. Evidence of such demeanour consistent with the complainant’s account would be admissible provided it was almost immediately proximate to the alleged assault.

ITALY

1. The statement of the victim can always be the only evidence per se sufficient for the prosecution to make a case against a person (and for the court to convict the accused) if the victim seems to be reliable. There are no limitations in the criminal procedure code and it customarily happens

2. Under art 192 sec 3, of the criminal procedure code, the liability assertions made by a person involved in the crime against other people, must be compared with other elements or evidences, in order to evaluate their reliability. This evidence standard should be considered by the prosecutor before finalizing a formal indictment. The conviction of D without any evidence apart from testimony [from an alleged accomplice] would consist in a breach of the law. In particular, it would be a breach of the proof standard set forth by the law, for which the defendant could appeal in front of the Supreme Court.

3. But no supporting evidence is required.

NETHERLANDS

1. But if there is [independent] evidence of the damage to the car, that would probably be regarded as enough supporting evidence.
2. This jurisdiction operates the “unus testis, nullus testis” rule: one witness is no witness.

3. This is a difficult scenario... I think that this evidence would justify a prosecution, but a conviction would depend very much on what D says about the scratch and the contact with [the complainer], his whereabouts etc and whether relevant information can be found as to the scratch – once again applying the test under “unus testis” whether the scratch can be considered to support the [complainer’s] statement.

4. There is a doctrine concerning the support by testimony as to distress. The mother’s statement would have to be regarded as supporting [the complainer’s] story, which is of course more likely in this distress situation than if the mother would have simply stated that the daughter has told her that she was raped by D. However, the most important sub-principle under the ‘unus testis nullus testis’ rule is that the supporting evidence must be independent from the (primary) witness, and ‘emotions’ are not regarded as independent. (There are however rare examples of cases in which the witnessing of ‘distress’ is allowed as supporting evidence, perhaps because the distress was witnessed very shortly after the alleged offence.)

NORWAY

1. In principle yes, but it would probably be difficult to meet the standard of “beyond reasonable doubt” based on this hearsay evidence alone. The result would most likely be that the case is dropped.

2. Evidence from an alleged accomplice would be sufficient to start an investigation of a suspect, but some sort of supporting evidence would be necessary to establish the necessary guilt beyond reasonable guilt to prosecute.

3. Word against word is not uncommon in cases like this, but the risk of the case being dropped due to lack of evidence to establish guilt beyond reasonable doubt is obvious. Supporting facts would have to be searched for.

SOUTH AFRICA

1. If it truly is the only evidence (and there are no shoe, foot or fingerprints available) the prosecution would probably decline to prosecute – as the courts would be reluctant to convict on the basis of a hearsay statement alone (although there is no rule prohibiting such a conviction provided the hearsay is found to be admissible).

SWEDEN

1. It would depend on whether the statement was a preliminary report to the police or a more in-depth interview. The latter may be admissible as evidence.

2. Uncorroborated testimony of rape complainer is insufficient per se, but uncorroborated testimony can be sufficient for petty crimes (e.g. simple theft)

3. In sexual assault cases empirical evidence is deemed necessary in order to corroborate the statement’s details.
SWITZERLAND

1. This sufficient evidence for prosecution, but probably not for conviction: the defence would not have the opportunity to confront Mr A (whose evidence is presumably here sole and decisive). The opportunity to question the policeman would probably be insufficient.

USA (NEW YORK)

1. Hearsay evidence is insufficient for conviction, without corroboration. Note however that the Federal Rules of Evidence do not explicitly require corroboration, although some federal court may require it.

2. Accomplice testimony must be corroborated in New York State.

USA (FEDERAL)

1. There is no particular warning which must be given in relation to accomplice evidence, but the judge would certainly give the jury an instruction regarding evaluating the credibility of witnesses and such witnesses in particular.
TABLE 5
Identification evidence

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Dock identification is permitted even if no prior positive identification

Dock id by one witness is sufficient per se for conviction

Fleeting glance ID evidence can be used

Special warnings for some ID evidence

Accused can call expert evidence that some forms of identification evidence can be problematic

X √ √ X √ X¹ √ √ X¹ √ √ NA¹ √ NA¹
NA √ √ X¹ X¹ X X v² X v² X v² X v² X v² X v² X v²
√ √ √ v² v v v v v v v v
√ X v NA² v² NA¹ v X NA³ NA NA² v² ?²
√ X² X X NA² X NA¹ v³ v NA⁴ NA NA² v ?²
Sole evidence is one police officer who identifies accused as perpetrator from CCTV footage.

AUSTRIA
1. It is difficult to know whether this would be sufficient per se. It depends on whether the judge believes the witness or not, and whether she can explain to the judge why didn’t recognize the suspect as the perpetrator before.
2. Expert witnesses are called by the court, the accused is not allowed to use an expert witness as such. This is hotly debated in Austria though.

CANADA
1. The videotape itself would allow the court to make its own identification.
2. If analogous, showing propensity.

ENGLAND
1. Dock identifications are not technically inadmissible at common law but there is long-standing authority that in jury trials they are undesirable and should be excluded wherever possible in the interests of fairness to the defendant. If a witness failed to pick out D at a properly conducted ID procedure, a trial judge is very likely to say that a dock identification could not be safely relied upon.
2. A jury warning is mandatory in all but exceptional cases. A failure to give the warning when it is required, or a failure to give it in appropriate terms, will generally lead to the quashing of a conviction.

GERMANY
1. Technically, the court could convict on this basis, but it is very unlikely that a court would do so because of the well-known unreliability of “dock identification”.
2. Not applicable since no jury.

IRELAND
1. Generally Dock ID is considered wholly unacceptable. It is considered the least satisfactory of all ID procedures, making a conviction in such circumstances very vulnerable to appeal. Having failed to identify at an ID parade, the acceptability of an alternative and manifestly less fair process as dock ID has occasioned the Court of Criminal Appeal to quash a conviction in such circumstances. Although there is no rule of law or practice which requires proof of identification by means of a formal ID parade, this is considered by far the best means of obtaining evidence of identity. When the prosecution seeks to rely
on identification evidence obtained by any other means, it must satisfy the court that there were good and objective reasons for resorting to those other means.

2. Fleeting glance ID requires a Casey warning: *People (AG) v Casey (No 2)* [1963] IR 33. The judge warns the jury of all factors affecting the reliability or otherwise of such evidence. That warning comprises of (a) a generic caution (b) the particulars of the ID including the factual content (c) the pre-trial procedure; and (d) the other evidence, if any, in the case. In addition, the caution must address (e) any special features of the identification.

3. Whilst recognition evidence is generally considered to be more reliable than identification evidence, a Turnbull style warning would be, at the very minimum, the protection afforded in this scenario.

4. Generally, evidence of previous convictions cannot be adduced by the prosecution during the course of a trial. Exceptions may arise where the court rules that such previous convictions constitute “similar fact evidence.” This is done on the application of the prosecution.

ITALY

1. The fact that the witness didn’t recognize D at the police line-up can be used by the defendant as an element to convince the court that the identification made at the trial is unreliable. In this case, the judge should have some other elements in order to motivate his belief that D is guilty. But if the court finds the witness’s testimony true and reliable, then this enough evidence to convict D.

NETHERLANDS

1. Not applicable: No juries

NEW ZEALAND

1. Dock IDs are inadmissible unless the police can show that they had “good-reason” not to conduct an out-of-court ID.

2. However, a warning must be given under s 126 Evidence Act 2006.

3. Possible use of expert witness- but warning to the jury of dangers associated with ID evidence may be sufficient.

4. It would be unlikely that the evidence of the officer would be admissible. It is not expert evidence and if it is just a case of the officer identifying someone in the dock from a video recording then the judge and/or jury are in an equal position to do the same – the evidence would not be relevant – and as such would not be admissible.

SOUTH AFRICA

1. A confession made to a peace officer who is not a magistrate or justice of the peace (i.e. made to a non-commissioned police office) must be reduced to writing in the presence of a magistrate or justice of the peace.

2. Recording must be played if one has been made and potentially exculpatory.
3. A court may convict on the basis of confession alone provided it “is confirmed in a material respect or, where the confession is not so confirmed, if the offence is proved by evidence other than such confession, to have been actually committed” (s 209 of the Criminal Procedure Act).
4. Dock identification is allowed but in the circumstances [i.e without there being a prior positive identification by the witness], would carry very little if any weight.
5. Yes, in so far that it is possible to convict on the basis of a single witness. However, in reality it is highly unlikely that in these circumstances the court will find that there is proof beyond a reasonable doubt.
6. Not applicable since no jury.

SWITZERLAND
1. Not really relevant – as the accused is identified in the pre-trial. If the witness failed to recognise the accused in a police line-up, s/he could be asked again about the issue of identification in subsequent hearings. The judge would be free to draw the appropriate conclusions.
2. Not applicable since no jury.

USA (NEW YORK)
1. However, a court may find that the in-court identification is unduly suggestive and violative of the Due Process Clause, especially considering that the defendant is the only person sitting in the courtroom resembling the attacker. If permitted, the court may find that cross-examination is the appropriate form to address any concerns with the in-court identification, leaving the jury as the final arbiter in what weight the in-court identification should be given.
2. Trial courts are generally required to provide a special warning for eyewitness identifications.

USA (FEDERAL)
1. In-court [dock] identification is allowed. Of course, the defence would be able to cross-examine the witness and bring out the fact that there was no prior identification and that the in-court identification might not be very reliable given the fact that everyone knows where the defendant sits in the courtroom.
2. The judge would give some sort of instruction about witness identifications. This would indicate that no particular type of evidence is necessary to prove identity. The judge would instruct the jury about evaluating eyewitness identification testimony and considering whether the witness had an adequate opportunity to observe the person in question at the time of the offense, including such matters as the length of time for the observation.
3. Expert testimony is admissible when it will assist the trier of fact to understand the evidence or determine a fact in issue. The trial judge would have a lot of discretion in determining whether to admit such expert testimony. It could help the trier of fact. On the other hand, the prosecution will argue that the jury can figure out these types of matters themselves and that permitting an expert to testify will be too likely to sway the jury towards concluding that the identification cannot be trusted.
### TABLE 6

Safeguards required before a suspect’s confession can be used as evidence

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Detained suspect must be warned by police prior to questioning of the right to silence/need not respond to questions?  
Confession has to be made in the police station?  
Police interviews must be audiotaped?  
Police interviews must be video-taped?  
Audio/video tape must be played at trial?  
Transcript of recordings must be available at the trial?  
Any other safeguards?  
Corroboration of confession
AUSTRALIA

1. The requirement that the police interview be taped is fairly broad, but there are situations where conversations with police need not be recorded, and there are also exceptions to the admissibility requirement that the tape recording be available. These issues have reached the Australian High Court on several occasions. An audio recording will suffice, but often there will be a video recording.

2. The requirement is that there is a “tape recording” (audio or video) “available to the court”. Ordinarily this would be played to the court – this would be the admission evidence – but this is not a strict requirement.

ENGLAND

1. If a suspect is alleged to have made an oral admission before interview (say on arrest, or in a police car, or in a police cell) the making of the admission must be put to him or her in interview, and the suspect should be asked to confirm it on tape. If the admissibility of the confession is in issue the prosecution will have to prove beyond reasonable doubt that it was not obtained by oppression, or by anything done or said likely to render unreliable any confession which the suspect might make. Furthermore it is open to a defendant to argue that the judge should alternatively exclude evidence of the confession on the ground that admission of the evidence would so adversely affect the fairness of the proceedings that it ought not to be admitted. Breach by the police of the provisions of the [Police and Criminal Evidence Act] Codes may result in exclusion of the confession.

NEW ZEALAND

1. But a caution need only be given if the person is a suspect and subject to being “detained”.

2. But if not made at the police station then it would be followed up by a formal, taped interview at the station.

3. But DVD recording is the standard procedure now.

4. No legal requirement for this, but such tapes are routinely played at trial.

SOUTH AFRICA

1. A confession made to a non-commissioned police officer is not admissible in evidence unless confirmed and reduced to writing in the presence of a magistrate or justice.

2. Yes, if made and potentially exculpatory.

3. A court is permitted to convict on the basis of confession alone provided it “is confirmed in a material respect or, where the confession is not so confirmed, if the offence is proved by evidence other than such confession, to have been actually committed”

USA (NEW YORK)

1. In Miranda v Arizona, the US Supreme Court held that the police must advise an individual of his constitutional rights before an interrogation in order to ensure that the individual understands his Fifth
Amendment right to be free from self-incrimination. However, the police are only required to provide a Miranda warning to a defendant when the individual is in police custody and under interrogation.

2. New York law requires that a confession must be corroborated by other evidence of guilt. NY CPL § 60.50 This can be evidence the offence charged has been committed. The NY expert who answered this questionnaire added: “I would recommend that the testimony of jailhouse witnesses who claim a defendant confessed to them or that they have overheard a defendant’s confession should be insufficient to convict absent corroboration of the alleged confession. ... Usually it is corroborated in the sense that the jailhouse witness gives evidence of a confession that he or she knows matches the prosecution’s theory of the case. So that sort of minimal corroboration will not be enough, under the circumstances under which these statements are made. I suggest that the testimony that the confession was made by the defendant be subject to corroboration by someone other than the inmate who claims to have heard it, as well as the details in the alleged confession.”

UNITED STATES (FEDERAL)

1. The police would have to give the full Miranda warnings if they are questioning a suspect while that suspect is in “custody.” Custody can mean a host of things, but it would include when the defendant is under arrest. The Miranda warnings include the right to be silent and the right to counsel.
TABLE 7

Use of juries in criminal trials, and any warnings given to them regarding problematic evidence

<table>
<thead>
<tr>
<th>COUNTRY</th>
<th>JURY?</th>
<th>WARNINGS?</th>
</tr>
</thead>
<tbody>
<tr>
<td>AUSTRALIA (NSW)</td>
<td>YES</td>
<td>Wherever the prosecution seeks to establish the guilt of an accused person with a case based largely or exclusively on a single witness it is important that the jury are told that they should exercise caution. This is just one of several warnings which may be given to the jury.</td>
</tr>
<tr>
<td>AUSTRIA</td>
<td>YES</td>
<td>Jury of eight lay judges decides on guilt and innocence. Three professional judges “guide” them and lead the trial. The three judges will always enter the deliberation room to deliver the jury instructions and to do a summing up of the case, where they can also discuss the evidence, but they are (theoretically) not allowed to assess the evidence for the jurors. They are permitted to attend parts or all of the deliberations if they unanimously consider it “useful” with regards to questions arising from the instructions. The jurors are given the possibility to vote against the presence of the judges by simple majority.</td>
</tr>
<tr>
<td>CANADA</td>
<td>YES</td>
<td>Where the complainer is the only witness, warnings on this basis are not permitted.</td>
</tr>
<tr>
<td>ENGLAND</td>
<td>YES</td>
<td>The judge has discretion whether to give a warning to the jury regarding accomplice evidence. The terms of any warning will depend on the circumstances of the case and the nature of any attack made on the credibility of the accomplice. A trial judge retains a discretion to give a warning in sexual assault cases where the complainant is the sole witness. In cases of alleged historic sex abuse it will often be desirable, although it is not mandatory, for the judge to give the jury a direction as to possible difficulties the defence faces as a result of the delay. In cases where the judge takes the view that it would be impossible for the defendant to receive a fair trial the judge should stop the prosecution as an abuse of process, but this is an exceptional step.</td>
</tr>
<tr>
<td>GERMANY</td>
<td>NO</td>
<td></td>
</tr>
<tr>
<td>IRELAND</td>
<td>YES</td>
<td>Where the complainer is the only witness, a discretionary warning may be given to the jury regarding convicting without corroboration. No particular wording is required. The trial judge should identify the points of evidence which may be regarded as corroboration and to then explain these to the jury.</td>
</tr>
<tr>
<td>ITALY</td>
<td>NO</td>
<td>[There is a jurisdiction which includes citizens among the court (not a real jury) but only for murder, causing death through the commission of another crime or other very serious offences (not rape).]</td>
</tr>
<tr>
<td>NETHERLANDS</td>
<td>NO</td>
<td></td>
</tr>
</tbody>
</table>
If, in a jury trial the judge is of the opinion that any evidence given in that proceeding that is admissible may nevertheless be unreliable, the judge may warn the jury of the need for caution in deciding—

(a) whether to accept the evidence; (b) the weight to be given to the evidence.

The judge must consider whether to give a warning (above) whenever the following evidence is given:

(a) hearsay evidence, (b) evidence of a statement by the defendant, if that evidence is the only evidence implicating the defendant, (c) evidence given by a witness who may have a motive to give false evidence that is prejudicial to a defendant,

(d) evidence of a statement by the defendant to another person made while both the defendant and the other person were detained in prison, a Police station, or another place of detention, (e) evidence about the conduct of the defendant if that conduct is alleged to have occurred more than 10 years previously.

A party may request the judge to give a jury warning but the Judge need not comply with that request—

(a) if the Judge is of the opinion that to do so might unnecessarily emphasise evidence; or

(b) if the Judge is of the opinion that there is any other good reason not to comply with the request.

It is not necessary for a Judge to use a particular form of words in giving the warning.

If there is no jury, the Judge must bear in mind the need for caution before convicting a defendant in reliance on evidence of a kind that may be unreliable.

IDENTIFICATION WARNINGS:

In a jury trial in which the case against the defendant depends wholly or substantially on the correctness of 1 or more visual or voice identifications of the defendant or any other person, the judge must warn the jury of the special need for caution before finding the defendant guilty in reliance on the correctness of any such identification.

The warning need not be in any particular words but must—
(a) warn the jury that a mistaken identification can result in a serious miscarriage of justice; (b) alert the jury to the possibility that a mistaken witness may be convincing; and (c) where there is more than 1 identification witness, refer to the possibility that all of them may be mistaken.

NORWAY YES Norway only has a jury in Appeal Courts and only in grave cases. District Courts are composed of both professional and lay judges (1 +2). An Appeal Court without jury is composed of 3 professional and 4 lay judges. Lay judges are always in majority.

No jury warnings.

SOUTH AFRICA NO

SWEDEN NO

SWITZERLAND NO [The last Swiss jury trials (eg in Zurich and Geneva) were abolished on the coming into force of the Swiss Federal Criminal Procedure Code in 2011.]

USA (NY) YES

USA (FED) YES The prosecution and defence submit to the judge a set of proposed jury instructions to have read to the jury before they deliberate. The judge would decide what instructions to give. Usually, both sides will present some proposed instructions regarding witness testimony and how to gauge witness truthfulness. E.g. the judge may instruct a jury: “In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said, or only part of it, or none of it. In deciding what testimony to believe, consider the witness’s intelligence, the opportunity the witness had to have seen or heard the things testified about, the witness’s memory, and any motives that witness may have for testifying a certain way, the manner of the witness while testifying, whether that witness said something different at an earlier time, and the extent to which the testimony is consistent with any evidence that you believe.”

IDENTIFICATION EVIDENCE: The judge would instruct the jury about evaluating eyewitness identification testimony and considering whether the witness had an adequate opportunity to observe the person in question at the time of the offense, including such matters as the length of time for the observation.
ANNEX: QUESTIONNAIRE

EVIDENTIAL RULES IN CRIMINAL TRIALS

Preliminary Issues

QUESTION 1: Does your jurisdiction have a test of ‘sufficiency of evidence’, ‘reasonable possibility of conviction’, or something similar, which the prosecuting authorities are required to satisfy, in order to prosecute a case?  YES/NO

If your answer to the above Question is ‘NO’, please go to Question 4.

QUESTION 2: Can you describe the test, please?

QUESTION 3: What is the status of the test? Is it enshrined in legislation? Or in a prosecutor’s code? If the latter, what is the status of this code?

QUESTION 4: In order to be satisfied of the accused’s guilt, is there any other test or evidential requirement that your courts apply in determining guilt?  YES/NO

If your answer to the above Question is ‘NO’, please go to Question 6, below.

QUESTION 5: Can you describe the test or requirement, please?

QUESTION 6: Following a conviction, does your jurisdiction have a mechanism by which an appeal may be allowed/conviction quashed if the appeal court takes the view that the evidence at the trial was insufficient, or insufficiently strong, to warrant conviction?  YES/NO

QUESTION 7: If the answer to question 6 (above) is ‘YES’, what test is applied in determining this? Please give details.

The following 5 scenarios are designed to offer a comparative perspective on the laws of evidence. We are interested in finding out whether what we in Scotland call ‘corroboration’ is also required in other jurisdictions, albeit under a different name, such as ‘supporting’, ‘confirmatory’ or ‘additional’ evidence. We are also keen to explore what safeguards against wrongful conviction exist in other jurisdictions. Some of the questions may seem rather strange, and indeed may make little sense in your jurisdiction. If you are unable to answer many of the questions and believe that a prosecutor and/or a judge would be better placed to respond, we would be grateful if you could consult others. If any question is unclear, please do not hesitate to ask us for further clarification.
SCENARIO 1

D is accused of vandalising his neighbour’s car, by walking over its roof, causing considerable damage (the crime of ‘vandalism’ involves deliberately damaging someone else’s property).

QUESTION 1.1: Let us assume that the only evidence against D comes from a statement from Mrs A that her husband told her that he saw D (his neighbour) damaging the car, her husband having died before he could give a statement to the police. Assuming that Mrs A seems to be a credible and reliable witness, would her evidence alone be sufficient for prosecution of D?  

YES/NO

If the answer to this question is ‘YES’, please go to Question 1.8 below.

QUESTION 1.2: Varying the scenario, let us assume that before he died, Mr A gave a statement to the police to the effect that he saw D damage the car. Assuming that Mr A had seemed to be a credible and reliable witness, would this written statement *per se* be sufficient for the prosecution to take a case against D?  

YES/NO

Please comment further:

If the answer to the above is ‘YES’, please go to Question 1.8, below.

QUESTION 1.3: Suppose now that Mr A is not dead, and is able to testify at trial, and that Mrs A gave a statement to the police that she heard her husband shout out, at the time of the incident: “D just walked over our car!” She did not see D, but can confirm the extent of the damage to the car. Assuming that Mr and Mrs A seem to be credible and reliable witnesses, would their evidence be sufficient for the prosecution to take a case against D?  

YES/NO

Please comment further:

QUESTION 1.4: Suppose that D has several previous convictions for vandalism. Would this, along with Mr A’s testimony alone, be sufficient for a prosecution to be taken against D for this offence?  

YES/NO

Please comment further:

QUESTION 1.5: Would it make a difference to your answer in question 1.4 (above) if D’s vandalism convictions were all for walking across the roofs of cars?  

YES/NO

Please comment further:

QUESTION 1.6: Suppose that when questioned by the police, D stated that he could not have damaged the car because he was on holiday in Spain at the time when the offence occurred. Police investigation shows this to be a lie. Would this, along with Mr A’s testimony alone, be sufficient for a prosecution for the vandalism offence?  

YES/NO
Please comment further:

QUESTION 1.7: Suppose that when questioned by the police, D admits that he vandalised A’s car. Are there any particular safeguards which would require to be satisfied before D’s confession could be used as evidence against him? For example:

(i) Would he require to be warned by the police, prior to being questioned by them, that he has a right to silence and need not respond to their questions? YES/NO

(ii) Would any confession have to be made in the police station? YES/NO

(iii) Would the interview with the police have to be audio taped? YES/NO

(iv) Would the interview with the police have to be recorded on video? YES/NO

(v) Would any such audio or video tape have to be played at the trial? YES/NO

(vi) Would a transcript of the interview based on the recordings have to be made available at the trial? YES/NO

QUESTION 1.8: Is there any other supporting evidence a prosecutor or court would be looking for in this scenario? Please give details:

SCENARIO 2
D is accused of raping B (that is, having sexual intercourse with her, without consent).

QUESTION 2.1: B gave a statement to the police stating that D, her former boyfriend, has raped her. Assuming that B seems to be a credible and reliable witness, would her evidence per se be sufficient for the prosecution to take a case against D? YES/NO

Please comment further:

If the answer to this question is ‘NO’, please go to Question 2.7.

QUESTION 2.2: Do you have a jury system for cases such as this, in your jurisdiction? YES/NO

QUESTION 2.3: If your answer to the above was ‘NO’, please go to Question 2.7.

QUESTION 2.4: Is there any particular warning or statement which the trial judge must or may give the jury concerning such evidence? YES/NO

QUESTION 2.5: If the answer to Question 2.4 is ‘YES’, can you please specify whether this is a mandatory warning, or whether the trial judge has discretion over whether to make it.

What would be the typical form of wording which a judge would or must use in such types of case?

QUESTION 2.6: If the trial judge forms the impression that B is not a credible or reliable witness, can the judge withdraw the case from the jury and/or direct the jury to acquit?
QUESTION 2.7: Would B be required to give oral evidence at the trial, or could her written evidence be used instead?

QUESTION 2.8: Suppose now that B says she scratched D on the face during the attack, and that D has a large scratch on his cheek when interviewed by the police. Would this, along with B’s statement or testimony, be sufficient for the prosecution to take a case against D? YES/NO

Please comment further:

QUESTION 2.9: Suppose instead of there being scratches, B’s mother saw her shortly after the sexual intercourse and has given a statement to the police saying that her daughter was hysterical at that time. Would this, along with B’s evidence that she was attacked, be sufficient for the prosecution to take a case against D? YES/NO

If the testimony of distress is to be used evidentially, how long a time interval can there be between the intercourse and B being seen by a third party to be in a state of distress?

Please comment further:

SCENARIO 3

D is accused of assaulting his wife on 3 occasions over a 2 year period.

QUESTION 3.1: Mrs D has given a statement to the police to the effect that
   (i) D punched her in early 2013, giving her a black eye
   (ii) Six months later, D deliberately broke her arm
   (iii) Six months after that, D kicked her, breaking her nose.

Assuming that Mrs D seems to be a credible and reliable witness, would her evidence per se be sufficient for the prosecution to take a case against D? YES/NO

Please comment further:

QUESTION 3.2: Suppose now that Mrs D’s medical practitioner gave a statement to the police to the effect that Mrs D had been treated by him on each of the 3 occasions described above. He does not know how she came by these injuries. Assuming that the doctor seems to be a credible and reliable witness, would his evidence, along with that of Mrs D, be sufficient for the prosecution to take a case against D? YES/NO

Please comment further:
QUESTION 3.3: To vary the scenario, suppose instead that the doctor tells the police that Mrs D told him, on each of the occasions on which he treated her, that her husband had caused her injuries. Assuming that the doctor seems to be a credible and reliable witness, would his evidence, along with that of Mrs D, be sufficient for the prosecution to take a case against D?

YES/NO

Please comment further:

QUESTION 3.4: Again, varying the scenario, what if there is no medical evidence, but E, who lives next door to Mr and Mrs D, gave a statement to the police that on the first and second of the occasions Mrs D has described, E heard Mrs D shouting ‘Please don’t hit me!’ E also noticed that Mrs D had the injuries (described above), when he saw Mrs D, the following day. Assuming that E seems to be a credible and reliable witness, would his evidence, along with that of Mrs D, be sufficient for the prosecution to take a case against D?

YES/NO

Please comment further:

QUESTION 3.5: What if E dies before the trial? Can his police statement be used as evidence?

YES/NO

If the answer to the above is ‘YES’, would the police statement, along with that of Mrs D, be sufficient for the prosecution to take a case against D?

YES/NO

Please comment further:

QUESTION 3.6: What if E dies before the trial, and before he could give a statement to the police, but had a diary in which he had noted the dates on which he had heard his neighbours shouting, and the various injuries sustained by Mrs D. Would this diary be admissible as evidence?

YES/NO

If the answer to the above is ‘YES’, would the diary, along with that of Mrs D, be sufficient for the prosecution to take a case against D?

YES/NO

Please comment further:

SCENARIO 4

F was convicted of stealing a large quantity of very valuable jewellery from a shop. She then told the police that D was also involved in the theft.

QUESTION 4.1: Would F’s evidence alone be sufficient for the prosecution to take a case against D?

YES/NO

Please comment further:

QUESTION 4.2: Do you have a jury system for some criminal cases in your jurisdiction?
If your answer to the above was ‘NO’, please go to Question 4.6.

**QUESTION 4.3:** If D’s case went to trial and F’s evidence formed all or part of the evidence against him, is there any particular warning or statement which the trial judge must or may give the jury concerning the potential unreliability of such evidence?  

**YES/NO**

**QUESTION 4.4:** If the answer to Question 4.3 is ‘YES’, can you please specify whether this is a mandatory warning, or whether the trial judge has discretion over whether to make it.  

What would be the typical form of wording which a judge would or must use in such types of case?

**QUESTION 4.5:** If the trial judge forms the impression that F is not a credible or reliable witness, can the judge withdraw the case from the jury and/or direct the jury to acquit?  

**YES/NO**

Please comment further:

**QUESTION 4.6:** Are there any other, particular safeguards which operate in your jurisdiction and which would help to prevent a potential miscarriage of justice in such a case?  

**YES/NO**

Please give details:

**SCENARIO 5**

D is accused of stealing G’s purse.

**QUESTION 5.1:** G gave a statement to the police, to the effect that she was walking along the pavement when D bumped into her and snatched the purse from G’s handbag. G said that she was sure she would recognise D again, and indeed picked him out as the perpetrator when he took part in an identity parade/police line-up. Assuming that G seems to be a credible and reliable witness:

(a) Would the above evidence *per se* be sufficient for the prosecution to take a case against D?  

**YES/NO**

(b) If G is in fear for her safety if she testifies against D, could she give her evidence as an anonymous witness?  

**YES/NO**

Please comment further, and in particular on any safeguards which would be required before anonymous evidence could be given by G:

**QUESTION 5.2:** Suppose instead that G is unable to identify D at the identity parade/police line-up. Can she be asked at the trial whether she recognises the person who stole her purse? (That is, is ‘dock identification’ permitted if there was no prior positive identification by the witness?)  

**YES/NO**
QUESTION 5.3: If the sole identification of D as the perpetrator is G’s testimony and dock identification, is this sufficient for a court to convict D of theft?  YES/NO

Please comment further:

QUESTION 5.4: Varying the above scenario, suppose that after G has given her statement to the police, she sees D later that week in a car park and calls the police. When a police officer arrives, G points to D and says that she is sure that he is the perpetrator. When the case comes to court, G states that she is no longer able to remember what the man who stole her purse looked like, but confirms that she pointed out someone in the car park to the police, and is still sure that the person she pointed out was the perpetrator. Can evidence from the police officer, confirming the car park identification of D as the thief, be led at D’s trial?  

YES/NO

QUESTION 5.5: If the answer to question 5.4 is ‘YES’ would this evidence alone be sufficient identification evidence for a prosecution?  YES/NO

Please comment further:

QUESTION 5.6: Varying the above scenario, suppose that G identifies D as being ‘rather similar in height and build’ to the person who stole her purse, but another witness H, who saw the incident, identifies D as ‘definitely the person who took the purse’. Assuming H is a credible and reliable witness, would G and H’s evidence be sufficient for the prosecution to take a case against D?  YES/NO

Please comment further:

QUESTION 5.7: Where a witness identifies the accused as the perpetrator of a crime, the perpetrator is not someone whom the witness knew prior to the incident, and the identification is of the ‘fleeting glance’ variety (that is, the witness accepts that she only saw the perpetrator for a short period of time), is this evidence capable of being used at the trial?  YES/NO

If you do not have a jury system, please go to Question 5.11.

QUESTION 5.8: If your answer to question 5.7 is ‘YES’, and you have a jury system for some criminal cases in your jurisdiction, is there any special type of warning the judge must give to the jury regarding such identification evidence?  YES/NO

QUESTION 5.9: If your answer to Question 5.8 is ‘YES’, is this a warning the judge must give? Or is it a matter of discretion on the part of the judge? Please give details. Please describe the nature of the warning/ words used in such cases:

QUESTION 5.10: Would the court permit the accused to lead evidence from an expert witness to the effect that such forms of identification evidence can be problematic?  YES/NO
QUESTION 5.11: Suppose now that G’s purse was found, minus her money and credit cards, in a rubbish bin, some distance from the scene of the crime, and that a fingerprint expert gave a statement to the police that a fingerprint on the purse matched that of D. If there were no other evidence whatsoever which linked D with the theft of the purse, would this alone be sufficient for the prosecution to take a case against D? YES/NO

Please comment further:

QUESTION 5.12: Are there any special requirements before such expert evidence is allowed to be considered by the court? YES/NO

Please expand on your answer:

QUESTION 5.13: Varying the scenario yet again, what if instead of a fingerprint expert, there was only closed-circuit television (CCTV) footage of the theft. D is a well-known thief, and a police officer, who knows D very well, views the CCTV recording and states that he can recognise the person who took the purse as D. If there were no other evidence whatsoever which linked D with the theft of the purse, would this police identification alone be sufficient for the prosecution to take a case against D? YES/NO

Please comment further:

QUESTION 5.14: Finally, these scenarios have explored the use of hearsay evidence, eyewitness identification evidence, confession evidence, accomplice evidence, expert evidence, distress by an alleged victim as evidence, evidence of police statements or other documentary evidence when a witness is unable to testify at trial; previous convictions as evidence, lies by the accused as evidence. Are there any other forms of evidence which are used in your jurisdiction, which have not been canvassed in these scenarios? Please give details:

Your details:
Name:
Occupation/Post:

Are you happy for any publication/final report which results from these findings to quote sections of your answer to the questionnaire? YES/NO

MANY THANKS INDEED FOR TAKING THE TIME TO ANSWER THIS QUESTIONNAIRE.
IT IS MOST APPRECIATED
17.1 Introduction

The proposed abolition of the general rule of Scottish criminal procedure\(^1\) that no one be convicted of any criminal offence in the absence of corroborated evidence gives rise to the question whether there is a corresponding need for the introduction of alternative safeguards. In this regard, article 6 of the ECHR, which has assumed considerable importance in relation to the regulation of the fairness of criminal trials in Europe, could be of relevance. Two principal questions fall to be considered. First, does article 6 ECHR set out any principles of importance in the context of corroboration and, secondly, if corroboration is removed, to what extent might article 6 ECHR be said to place constraints on the minimum quantity or quality of evidence required for a conviction?

In order to be able to assess the relevance of article 6 ECHR in event of the abolition of the corroboration requirement, it is useful to consider the reasons underpinning the doctrine. These are well illustrated by a short passage from Hume's *Commentaries*. According to Hume:\(^2\)

> ...no one shall in any case be convicted on the testimony of a single witness. No matter how trivial the offence, and how high soever the credit and character of the witness, still our law is averse to rely on his single word, in any inquiry which may affect the person, liberty or fame of his neighbour; and rather than run the risk of such an error, a risk which does not hold when there is a concurrence of testimonies, it is willing that the guilty should escape.

This statement clearly demonstrates not just reservations as regards the reliability of witness evidence, but also emphasises the relationship between corroboration and the standard of proof.

Before considering the regulation of these areas, it is useful, first, to consider the manner in which the Strasbourg authorities approach criminal evidence more broadly. This will provide the basis for considering the approach of the European Court of Human Rights (ECtHR) to witness evidence and the standard of proof required for conviction and will in turn allow for conclusions to be drawn on the consequences for fairness in the sense of article 6 ECHR of abolishing corroboration.

17.2 Article 6 ECHR and the regulation of criminal evidence law

*General principle: limited role for article 6 ECHR in the criminal evidence context*

It is often assumed that article 6 ECHR is of limited importance in the context of criminal evidence. Such assertions are not entirely unjustified in view of some, frequently cited, passages from the case law of the ECtHR. According to the ECtHR, for instance: “While article 6 of the Convention guarantees the right to a fair trial, it does not lay down any rules on the admissibility of evidence as such which is therefore primarily a matter for regulation under national law”\(^3\). Further it has often held that: “It is

\(^{1}\) It should be noted that there are numerous exceptions to the general rule, see D Sheldon, “Corroboration and relevance: some further thoughts on *Fox v HM Advocate* and *Smith v Lees*” 1998 15 SLT (News) 115. See also F P Davidson and P R Ferguson, “The corroboration requirement in Scottish criminal trials: should it be retained for some forms of problematic evidence?” (2014) 18 E&P 1; D Nicholson and J Blackie, “Corroboration in Scots law: ‘archaic rule’ or ‘invaluable safeguard’?” (2013) 17 Edin LR 152.


\(^{3}\) *Schenk v Switzerland*, 12 July 1988, Series A no 140, para 40.
not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, unlawfully obtained evidence – may be admissible, or indeed, whether the applicant was guilty or not”.  

Although the ECtHR frequently displays reluctance to become too involved in the evaluation of the evidence, there can be little doubt that it does, in some circumstances, set out rules which regulate situations in which the use of the evidence will violate the right to a fair trial.

**Some notable exceptions to the general principle**

**Evidence obtained by torture**

The use of evidence obtained in violation of the article 3 ECHR prohibition on torture (and perhaps also that on inhuman treatment) will automatically violate article 6 ECHR, irrespective of the weight of this evidence or its relevance for the conviction of the accused. This line of jurisprudence, in particular, stands in stark contrast to the statements of the ECtHR as set out in cases such as *Khan v United Kingdom*, not least because it essentially creates an absolute rule that this type of evidence may never be used.

**Evidence obtained by entrapment**

Evidence obtained by way of entrapment must never be used in convicting an accused. According to the ECtHR, “[t]he public interest cannot justify the use of evidence obtained as a result of police incitement”; the law “should not tolerate the use of evidence obtained as a result of incitement by State agents”.

**Evidence obtained before the accused was afforded the right to counsel**

Statements, irrespective of their weight, made before the accused was afforded the right to counsel cannot be used in convicting the accused:

...the Court finds that in order for the right to a fair trial to remain sufficiently “practical and effective”... Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6... The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.

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4 *Khan v United Kingdom*, no 35394/97, ECHR 2000-V, para 34.
6 n 4 above.
8 *Khudobin v Russia*, no 59696/00, 26 October 2006, para 134.
9 *Solduz v Turkey (GC)*, no 36391/02, 27 November 2008, para 55.
Absence of witness confrontation

The use in convicting the accused of witness evidence which was sole or decisive to the conviction and in the absence of “counter-balancing factors”, which would allow an assessment of the reliability of the evidence to be conducted, will violate article 6(3)(d) ECHR.10

Article 6 ECHR and convergence in the regulation of criminal evidence?

The importance of these “exceptions” to the oft expressed reticence of the ECtHR to become too involved in determining whether evidence can be used to convict the accused highlight the importance of the ECtHR’s role in the context of criminal evidence. The case law of the ECtHR has had a considerable impact on the criminal procedural systems of the Contracting States, albeit in different ways in different jurisdictions. It is tempting to read into this some sort of process of “gradual convergence”, with the potential to lead to a type of mixed model of proof. In fact, it is probably more accurate to characterize the ECtHR as having developed its own distinctive tradition, which is based on its notion of adversarial proceedings and the equality of arms principle.11 While this has resulted in the Contracting States having to adapt their systems, it has not necessarily led to “convergence” of the rules of evidence and procedure. In spite of this, there are a couple of issues which are of particular relevance in the comparative context and which should be kept in mind when considering the ECtHR’s case law.

First, although the ECtHR frequently refers to the “admissibility” of evidence,12 it is questionable whether the concept of admissibility makes much sense in many European jurisdictions, particularly in view of the absence of rules on the exclusion of evidence. Indeed in many jurisdictions it is a fundamental principle of criminal evidence that the judge be afforded access to all of the evidence, even though he or she may be required to refrain from using various pieces of evidence in convicting the accused. In view of this, admissibility seems to be used by the ECtHR to mean “use of the evidence in reaching a verdict”. In this regard the obligation to provide reasons for the verdict takes on particular importance as a means of ensuring that the court has only relied on evidence which it may fairly use.

Second, a crucial aspect of the case law of the ECtHR in the context of criminal evidence is the role afforded to the courts in the context of the determination of the evidence. The notion of freedom of judicial consideration of the evidence is frequently stressed by the ECtHR as an important means of ensuring the fairness of the proceedings. The trial judge is sometimes referred to as the “ultimate guardian of the fairness of the proceedings”13 and in many cases the ECtHR has stressed that the discretion of the court to determine whether the reliance on the evidence is fair is of central relevance to determining whether the proceedings as a whole were fair in the sense of article 6 ECHR.14 This focus on judicial consideration of the evidence as a means of upholding fairness – which admittedly stands in contrast to various strands of the ECtHR’s case law, notably the prohibition on

10 Al-Khawaja and Tahery v United Kingdom, (GC), nos 26766/05 & 2228/06, 15 December 2011.
12 See Schenk and Khan.
14 See e.g. Khan at para 38.
the use of evidence obtained by torture – can be marked as one of the most important features of
the case law, particularly following the decision of the Grand Chamber in Al-Khawaja and Tahery.\textsuperscript{15}

These principles should be kept in mind when considering the nature of the regulation of the
standard of proof and witness evidence and the relevance of these rules in the context of the
abolition of the corroboration doctrine.

17.3 Article 6 ECHR and the standard of proof

\textit{Article 6(1), Article 6(2) and Article 6(3)(d) ECHR}

One argument might be that in the absence of corroboration, the evidence at issue will not be
sufficient to meet the standard of proof requirement. It is important in this regard to note that there
are differences in the interpretation of the standard of proof across Europe. Unlike in the UK, many
European jurisdictions do not set out two separate standards of proof for civil and criminal cases;
one standard of proof applies in all cases.

The ECtHR will occasionally conduct an evaluation of whether the standard of proof has been met,
but it generally focuses more on manner in which the domestic court evaluated the evidence rather
than on the actual evaluation of the evidence itself. In this regard it frequently refers to the
requirement that “the requests and observations of the parties are truly ‘heard’, that is to say,
properly examined by the tribunal”,\textsuperscript{16} that the judgments of courts and tribunals “adequately state
the reasons on which they are based”\textsuperscript{17} and that “the burden of proof is on the prosecution and that
any doubt should benefit the accused”.\textsuperscript{18}

The ECtHR will generally consider the matter of the sufficiency of the evidence in the context of
article 6(1) ECHR (overall fairness of the proceedings) and, in those cases in which the evidence at
issue concerns witness testimony, article 6(1) ECHR in conjunction with article 6(3)(d) ECHR,\textsuperscript{19} rather
than in the context of the presumption of innocence as guaranteed by article 6(2) ECHR. The focus of
article 6(2) ECHR tends to be on the location of the burden of proof rather than the standard of proof
itself.\textsuperscript{20}

\textit{Article 6(1) ECHR and arbitrariness}

Although the ECtHR tends to refer to “fairness as a whole” in the context of the sufficiency of the
evidence, its focus is on the notion of arbitrariness. Arbitrary evaluation of the evidence will violate
article 6(1) ECHR, but it is important to note that the standard set by the ECtHR for review is
extremely high. The ECtHR frequently notes that: “Article 6 of the Convention does not lay down any

\textsuperscript{15} Discussed below (n 40).
\textsuperscript{16} \textit{Ajdarić v Croatia}, no 20883/09, 13 December 2011, para33; see too \textit{Dulaurans v France}, no 34553/97, 21
March 2000, para 33; \textit{Donadzé v Georgia}, no 74644/01 74644/01, 7 March 2006, para para 32 and 35; and \textit{Dima
v Romania}, no 58472/00, 16 November 2006, para 34.
\textsuperscript{17} \textit{Garcia Ruiz v Spain}, [GC], no 30544/96, ECHR 1999-I, para 26; \textit{Ajdarić v Croatia}, no 20883/09, 13 December
2011, para 34.
\textsuperscript{18} See eg \textit{Barberà, Messegue and Jabardo v Spain}, 6 December 1988, Series A no 146, para 77; \textit{Lavents v Latvia},
no 58442/00, 28 November 2002, para 125; and \textit{Melich and Beck v Czech Republic}, no 35450/04, 24 July 2008,
para 49; \textit{Ajdarić v Croatia}, no 20883/09, 13 December 2011, para 35.
\textsuperscript{19} See \textit{Sievert v Germany}, no 29881/07, 19 July 2012.
rules on the way evidence should be assessed, which are therefore primarily matters for regulation by national law and national courts”. In particular, it is not the ECtHR’s function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. The Court will not, in principle, intervene, unless the decisions reached by the domestic courts appear arbitrary or manifestly unreasonable and provided that the proceedings as a whole were fair as required by article 6(1) ECHR. The arbitrariness can stem either from the failure to apply the law or from the assessment of the evidence:

Failure to apply the law

In *Anđelković v Serbia*, which concerned an employment law dispute, the ECtHR held that the Serbian court’s reasoning “had no legal foundation... and was based on what appears to be an abstract assertion quite outside of any reasonable judicial discretion”. In essence the court had failed to apply the relevant law. In view of the fact that “a connection between the established facts, the applicable law and the outcome of the proceedings” was “wholly absent from the impugned judgment”, the ECtHR held that the ruling was arbitrary and “amounted to a denial of justice”. Not surprisingly, there are very few cases in which the ECtHR has found a violation of article 6 ECHR in the context of this type of arbitrary application of the law.

Arbitrariness in the assessment of the evidence

More relevant in the context of corroboration is the position of the ECtHR in relation to the domestic court’s assessment of the evidence. As a general rule, the approach of the ECtHR can be characterised as one of reluctance to find fault with the decision making processes of the national courts. In *Sievert v Germany* for instance the ECtHR held that there was “nothing to establish that the assessment of the evidence by the domestic courts in the case at hand was arbitrary or that the reasons advanced for their conclusion that there had been a causal connection between the victim’s ill-treatment and his subsequent death in hospital, infringed the principle of in dubio pro reo*. Similarly, in *Camilleri v Malta*, the Court declared the applicant’s complaint that he had been convicted solely on the basis of an incriminating statement made by a witness in his absence to be manifestly ill-founded. The witness subsequently retracted the statement, a retraction which he subsequently confirmed at trial, thereby essentially denying the accused the right to cross-examine the witness. The trial court nevertheless relied on the initial statement in convicting the accused. The ECtHR held that it was sufficient that the accused was able to question the witness at trial as to why he had originally made the incriminating statement. In addition the trial court had heard the witness in person and given detailed reasons in its verdict for the decision to attach weight to the original statement. Consequently the ECtHR held that the verdict of the trial court could not “be

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21 Sievert at para 68.
22 See eg *Garcia Ruiz v Spain* [GC], no 30544/96, ECHR 1999-I, para 28.
24 No 1401/08, 9 April 2013, para 27, referring to *De Moor v Belgium*, 23 June 1994, Series A no. 292-A, para 55.
25 Ibid.
26 Sievert at para 68.
28 Discussed in more detail below (n 45).
deemed arbitrary or manifestly unreasonable, all the more so since it was affirmed by three instances on appeal”.

The ECtHR has, on occasion, found a violation of article 6 on the grounds of the arbitrary assessment of the evidence. In *Khamidov v Russia*, the ECtHR stressed that it was “not its task to take the place of the domestic courts, which are in the best position to assess the evidence before them, establish facts and interpret domestic law”. It nevertheless found a violation of article 6 ECHR on the basis of gross arbitrariness. It noted that the judgment of the domestic court had established that “the consolidated police units of the Ministry of the Interior had unlawfully occupied the applicant’s estate and that they had not complied with the district military commander’s order of 25 May 2000 to preserve the applicant’s estate from destruction.” The ECtHR held that this “cannot but imply that the consolidated police units had inflicted damage on the estate”. In spite of this, “the domestic courts surprisingly considered it unproven that the applicant’s estate had been occupied by the Ministry of the Interior and that it was the defendant Ministry which had damaged the applicant’s property”. Consequently the ECtHR held that it was “perplexed by this conclusion” and could not “see how it could be reconciled with the abundant evidence to the contrary, and, first of all, with the findings made in the judgment of 14 February 2001, or the replies from public officials”. According to the ECtHR, “the unreasonableness of this conclusion is so striking and palpable on the face of it that the decisions of the domestic courts in the 2002 proceedings can be regarded as grossly arbitrary, and by reaching that conclusion in the circumstances of the case the domestic courts in fact set an extreme and unattainable standard of proof for the applicant so that his claim could not, in any event, have had even the slightest prospect of success.”

In *Ajdarić v Croatia*, the applicant, who had been convicted on three counts of murder and sentenced to 40 years’ imprisonment, argued that the reasoning of the national courts had been arbitrary and that his conviction had been based solely on hearsay evidence given by a mentally ill individual and that this evidence had not been corroborated in any manner. The domestic courts expressly noted that there was no other evidence implicating the applicant in the murder. The ECtHR then entered into a detailed consideration of the evidence assessed by the domestic courts. It noted that the psychiatric examination of the witness revealed that he was unstable and recommended he undergo compulsory psychiatric treatment; this recommendation was not followed. The evidence given by the witness related to a conversation, which he claimed to have heard between another person (MG) and the accused; this was disputed by MG. The witness was unable to reproduce exactly what the applicant and MG were saying; he had had disputes with both MG and the applicant; he had expressed prejudice against the applicant as a foreign national; his statements were often contradictory.

According to the ECtHR these discrepancies “called for an increasingly careful assessment by the domestic courts”. It noted that the applicant had raised a number of specific objections to the reliability of the evidence pointing out “various discrepancies” and “lack of logic” in his statements. It found the “responses of the national courts to those arguments inadequate”. It “made no effort to
verify” the statement of the witness but “accepted them as truthful” despite his mental illness.\textsuperscript{35} In addition, they failed to comment on the “contradictory witness statements” which were nevertheless of considerable importance to undermining the reliability of the witness’ statements. In view of this the ECtHR held that the decisions reached by the national courts were not “adequately reasoned”.\textsuperscript{36}

Consequently, “the decisions of the national courts did not observe the basic requirement of criminal justice that the prosecution has to prove its case beyond reasonable doubt and were not in accordance with one of the fundamental principles of criminal law, namely, \textit{in dubio pro reo}”.\textsuperscript{37} In view of the violation of the fairness as a whole under article 6(1) the ECtHR held that it was not necessary to address the applicant’s complaints under article 6(2) and 6(3).\textsuperscript{38}

\textit{Conclusion}

These cases demonstrate that while arbitrary decision-making – particularly in the absence of sufficient evidence – will violate article 6 ECHR, the ECtHR will only intervene in what might be characterised as extreme circumstances. The conviction of an accused on the basis of the testimony of one witness has the potential to undermine the fairness of the proceedings, but this is unlikely to prove particularly relevant in Scotland in the event of the abolition of the corroboration requirement.

\textbf{17.4 Witness evidence and article 6(3)(d) ECHR}

\textit{General remarks}

Witness evidence is recognised in all European jurisdictions as potentially untrustworthy and this scepticism about the inherently unreliable nature of the evidence explains both the existence of the doctrine of corroboration and the fact that witness evidence is expressly regulated in fair trial norms, such as article 6(3)(d) ECHR. According to article 6(3)(d) ECHR, the principal means of ensuring the fairness of the use of witness evidence is to afford the accused the right to confront the witness as to his or her incriminating testimony. Again the focus of the Strasbourg authorities is thus very much on ensuring that the accused is afforded the procedural opportunity to challenge the evidence rather than setting out any rules (such as corroboration) on the nature or quantity of the evidence.

\textit{The right to confrontation post-Al Khawaja}\textsuperscript{39}

The ECtHR’s regulation of witness evidence can be characterised as principally relating to the manner in which the evidence is heard and challenged. It is notable that there is no prohibition on hearsay evidence. As a general rule the accused must be afforded the opportunity to confront witnesses regarding their incriminating statements at trial or at an earlier stage in the proceedings, providing that the rights of the defence are sufficiently respected. The authorities are under an obligation to ensure that such a confrontation hearing can take place. In some cases, for reasons not connected to the authorities’ actions (such as the death or disappearance of a witness), it will not be possible for a confrontation to take place. In such circumstances, the ECtHR has traditionally relied upon a

\textsuperscript{35} At para 47.
\textsuperscript{36} At para 51.
\textsuperscript{37} At para 52.
\textsuperscript{38} At para 53.
\textsuperscript{39} For further discussion of this issue, see ch 9.
distinction between ‘sole or decisive’ witness evidence and other witness evidence. The ‘sole and
decisive’ evidence test might be seen as mirroring to some extent the pre-occupations of the
corroborated doctrine. Particular care has to be taken in convicting an accused if the evidence on
which the court is relying stems from a single witness. In such cases, the ECtHR held in a long line of
jurisprudence that the failure to afford the accused the opportunity to challenge sole and decisive
evidence would undermine the fairness of the trial.

This line of case law was of course “interrupted” following the UK Supreme Court’s “rebellion” in
Horncastle and the subsequent judgment of the Grand Chamber of the ECtHR in Al-Khawaja and
Tahery v United Kingdom.\(^{40}\) In Al-Khawaja, the ECtHR held that the domestic courts were entitled to
rely on the sole and decisive evidence of a witness, whom the defence had not had the opportunity
to confront, if “sufficient counterbalancing factors” were in place which would allow a “fair and
proper assessment of the reliability of the evidence” to be conducted.\(^{41}\) The judgment thereby
introduced a new factor – that of “counterbalancing factors” – supposedly with the potential to
guarantee the fairness of the proceedings in the absence of confrontation.

In Al-Khawaja, the ECtHR seemed to indicate that the existence of other evidence (in this case
statements made by friends of the victim, to whom the victim had promptly told what had
happened) could be such as to constitute a sufficient “counterbalancing measure” noting that “it
would be difficult to conceive of stronger corroborative evidence, especially when each of the other
witnesses was called to give evidence at trial and their reliability was tested by cross-examination”.\(^{42}\)
The problem here though is that this seems simply to suggest that the Grand Chamber was not
convinced that the witness evidence which provided the foundation for the accused’s conviction was
sole and decisive. The counterbalancing factor in Al-Khawaja seems simply to be other evidence. It is
interesting to note in this regard that the ECtHR essentially substitutes its view of the evidence for
that of the trial judge (who had expressly stated “no statement, no count one”), albeit discreetly and
under the guise of “counterbalancing factors”. These differing interpretations of the weight of the
evidence at issue may also indicate differences in the interpretation of the standard of proof in
England and Wales and by the Strasbourg authorities.

Finally, it is difficult to conceive of other counterbalancing factors which would be sufficient to
compensate for the opportunity of the defence to confront the witness. The UKSC’s criticism of the
sole and decisive test on the basis that “the more cogent the evidence the less it can be relied
upon”\(^{43}\) seems to make assumptions about the cogency of the evidence in the absence of adversarial
testing. Just as the movement away from the “sole and decisive” test might be seen as reflecting a
movement towards reliance on the judge to determine which evidence can be fairly used, so too
might the abolition of the doctrine of corroboration be seen to place confidence in the judge or fact
finder to vouch for the reliability of the evidence and of the conviction.

“Substantive” opportunity to confront witnesses

Another factor of relevance is the question how to treat the evidence of witnesses who, after having
made incriminating statements at an earlier stage in the proceedings, refuse to confirm these
statements at trial, remain silent or recant on their earlier testimony altogether. Some courts have

\(^{40}\) no 26766/05, 15 December 2011. This is discussed in more detail in ch 8
\(^{41}\) At para 147.
\(^{42}\) At para 156.
\(^{43}\) Re Horncastle and Others [2009] UKSC 14 at para 91.
interpreted the right to confront witness evidence as comprising not just the procedural right to confront the witness but also the right to substantively engage with the witness’s accusations. It is fair to say that the ECtHR has been extremely unreceptive to such arguments and has tended to consider the matter as one of arbitrariness rather than in the context of procedural opportunities.

In Sievert, two witnesses who had incriminated the accused during pre-trial hearings refused to answer the questions of the defence at trial. The applicant argued that the court’s reliance on these statements in convicting him violated the in dubio pro reo principle. The ECtHR held that the court had conducted a “fair and proper assessment” of the witnesses’ reliability and that there had been no violation of article 6(3)(d) ECHR. Similarly in Bayer v Austria, in which the accused complained that the witness refused to answer his question, the Commission held that the witness was present at trial and that it could not be held against the authorities if the witness then refused to give evidence. The reading out of the earlier statements was not considered to violate article 6(3)(d) ECHR. In Camilleri v Malta, the applicant complained that he had been convicted solely on the basis of the statements of a witness who had subsequently retracted the incriminatory statements at trial. The ECtHR held that the trial court was entitled to rely on the previous statements of the witness and that the fact that the applicant had had the opportunity to cross-examine the witness as to the reasons for making the incriminatory statements “more than compensated for any alleged disadvantage which may have resulted from the fact that the statement was made in circumstances in which he was unable to challenge its veracity”.

Confrontation and corroboration

The absolute requirement that the defence be afforded the opportunity to challenge sole and decisive witness evidence shares a clear affinity to the corroboration doctrine in its scepticism towards convictions based on the evidence of one witness. The judgment of the Grand Chamber in Al-Khawaja and Tahery, and in particular the introduction of the nebulous concept of “counterbalancing factors”, however, can be characterised as representing a movement away from red-line rules and towards judicial evaluation of the evidence as a sufficient guarantee of fairness. In this regard the judgment must be seen in the broader context of a move away from exclusionary type rules towards a more “flexible” approach in the consideration of the evidence. In this regard it is somewhat ironic that the development of the jurisprudence in this regard was precipitated by the United Kingdom Supreme Court, not least because the ECtHR’s case law on article 6(3)(d) ECHR was often characterised on the continent as an “anglo saxon”, “common law” doctrine without any basis in continental criminal legal traditions. In any event, it is clear that the doctrine of corroboration goes further than the regulation of witness evidence in article 6(3)(d) ECHR.

64 See the cases of the Court of Cassation of the Canton of Zurich: Kass Nr 2003/014; Kass Nr 2002/076.
65 Sievert v Germany, no 29881/07, 19 July 2012 at para 67.
66 Bayer v Austria (dec) no 13866/88, 2 April 1990.
17.5 Conclusions: article 6 ECHR and the consequences of abolishing corroboration

The nature of the supervisory role of the ECtHR is such that the abolition of corroboration is unlikely to have any immediate impact in terms of the fairness of the proceedings as defined by article 6 ECHR. Certainly its abolition will not lead to a whole host of findings of a violation of article 6 ECHR. Only an arbitrary conviction on the basis of a patently unreliable witness statement is likely to give rise to a finding of a violation of the fairness of the trial. There has been much discussion of the concrete measures which might be introduced to compensate for the abolition of corroboration, but it seems unlikely that the ECtHR would become involved in such matters. The only exception here might be an increased focus on the requirement that reasons be provided for the verdict.

Corroboration might well have a symbolic importance, reminding both the judge and the fact finder of the importance of the higher standard of proof in criminal cases as required by the commitment to crucial principle of criminal law that proceedings be skewed in favour of preventing the wrongful conviction of innocent accused even if this means the acquittal of the guilty in some cases. It is unclear, however, how seriously this principle is taken by the Strasbourg authorities. This uncertainty probably reflects the fact that in the majority of continental European jurisdictions the same standard of proof applies in both criminal and civil cases.

The abolition of corroboration can be seen as comprising part of a broader move away from exclusionary “red line” rules to discretionary exclusionary rules and the reliance on judicial consideration of the evidence to uphold the fairness of the proceedings. The fact that the ECtHR’s case law seems to be moving in a similar direction means that the abolition of the corroboration requirement is unlikely to give rise to many consequences in terms of article 6 ECHR.

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48 See Davidson and Ferguson (n 1).
CHAPTER 18: THE DUTCH \textit{UNUS TESTIS, NULLUS TESTIS} RULE

Leonie van Lent and Ingeborg Braam

18.1 Introduction

In February 2014, the Willem Pompe Institute for criminal law and criminology (University of Utrecht) was requested to write a report on the meaning of and discourse on the Dutch rule of \textit{unus testis, nullus testis} for the Academic Expert Group informing the Post-Corroboration Safeguards Review of the proposal by the Scottish government on abolition of the corroboration requirement. The following questions were put to us:

1) What does the Dutch “\textit{unus testis, nullus testis}” rule entail?
2) How does this rule work?
3) Has the rule been the subject of criticism and/or have reforms been suggested?

Furthermore, two more specific research questions were suggested for consideration:

4) Has there been any suggestion that the Dutch rule might be contrary to the European Convention for the Protection of Human Rights and Fundamental Freedoms, on the basis that a requirement of corroboration might leave victims of some crimes (e.g. sexual offences which take place in private) without an effective remedy?
5) Has there been any suggestion that the right to legal assistance, \textit{post-Salduz}, might lead to a relaxation of the Dutch rule, because suspects are less likely to speak while they are in police custody?

In order to answer these questions, a black-letter approach was used. Besides the statutory law itself, this report’s main source is the case law of the Dutch Supreme Court (\textit{Hoge Raad}). This case law was found by using online databases (\textit{Kluwer Navigator} and \textit{rechtspraak.nl}). Besides statutory and case law, we have also taken literature analyses of the Dutch \textit{unus testis, nullus testis} rule and commentaries on the case law into account.

The first chapter of this report provides an introduction to the Dutch law of criminal evidence. It gives an overview of the statutory rules on criminal evidence as laid down in the Dutch Code of Criminal Procedure. Particular attention is given to the rule on minimum witness evidence (\textit{unus testis, nullus testis}), as this is the Dutch counterpart of the Scottish corroboration rule. The second chapter discusses the case law on the \textit{unus testis, nullus testis} rule, mainly summarising the case law by the Supreme Court from 2009 until 2014 in chronological order. After each year’s case law, an overview is given of the main scholarly opinion concerning such jurisprudence, as well as that of the Advocate-Generals in their submissions preceding the Supreme Court’s decisions.\footnote{An Advocate-General provides the Supreme Court with advice (a \textit{conclusie}) in each of the cases it has to decide on. These “Conclusions” contain an analysis of the legal issue brought up by the case at hand on the basis of legislation, case law and literature, ending in a \textit{conclusie} as to the decision to be taken by the Supreme Court (to quash or to uphold the judgment). The Supreme Court is not required to follow the advice nor to give reasons in its judgment for not following the advice. These Advocates-General are neither member of the judiciary nor of the Public Prosecution Service, but are officers of an independent judicial organization attached to the Supreme Court (\textit{parket van de procureur-generaal bij de Hoge Raad}). Advocates-General are mostly former professors of criminal law.}

Finally, a
conclusion is provided in which the main findings are summarised and the five questions listed above are answered.

There are two important, interrelated, reasons why the most recent case law is discussed in such detail here. The first is the content of the Scottish debate: Lord Carloway has grounded his proposal to abolish the corroboration requirement, *inter alia*, on the claim that Scotland was the only country in the civilised world to retain such a rule; Chalmers has contradicted that claim by referring to the Dutch rule. A thorough overview of what the Dutch rule entails and thus to what extent it can be compared to the Scottish corroboration rule can only be provided by discussing the most recent Supreme Court case law. The second reason is the development of the rule. In 2009, the Supreme Court changed its approach to the * unus testis*, *nullus testis* rule, which became more stringent. That fact in itself is of importance for the Scottish debate, since this is all about (the legitimacy of) going in the opposite direction. However, under this new approach Dutch scholars and courts have become increasingly confused about what principles, rules and prohibitions actually apply. Although we, of course, end this report with a conclusion, this conclusion cannot provide genuine insight into the Dutch rule, since the Supreme Court’s case law hardly allows for such. The extensive overview of the case law therefore also serves as a compensation for the lack of clear cut rules, in that it provides at least possibilities of comparison.

CRIMINAL EVIDENCE IN DUTCH STATUTORY LAW

18.2 An introduction to the Dutch rules on criminal evidence

The Dutch Code of Criminal Procedure (CCP) contains several provisions on evidence. Article 338 CCP is the foundation of the whole law of criminal evidence. This article provides that the trial judge can only come to the decision that the defendant has committed the act described in the indictment – and therefore is guilty – if he is convinced of this throughout the trial, based on the statutory means of proof at hand.

Article 339(1) CCP lays down the statutory means of proof, which are:

1°. The trial judge’s own observations;
2°. Statements by the defendant;
3°. Statements by a witness;
4°. Statements by an expert;
5°. Documents.

Article 339(2) CCP goes on to state that facts or circumstances of common knowledge do not need to be proven. Articles 340 through to 344 further define each of these means of proof, which are, insofar as they are relevant for this report, discussed below.

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On the basis of these two articles, the Dutch system of criminal evidence is qualified as “negative-statutory” (negatief-wettelijk). It qualifies as “statutory”, because a judge can only base his evidentiary decision on the statutory means of proof listed in article 339(1) CCP and, it is “negative”, because the trial judge may not convict the defendant unless the evidence has convinced him that the defendant is indeed guilty. In other words, even if there is a mass of statutory evidence, a judge may not convict if he is not convinced of the defendant’s guilt. The Dutch system of criminal evidence thus leaves the criminal courts with much freedom to attach weight to the evidence that has been presented to them (in the case file and at the trial hearings). The Supreme Court has consistently held that the criminal courts are free to assess and select the evidence on which they base their decisions:

5 Corstens and Borgers, *Het Nederlands strafprocesrecht* (n 3) 713.
6 Corstens and Borgers (n 3) at 720.

It is the prerogative of the judge of facts to, within the limits of the statutory law, use from the available evidence those means of proof which he deems useful in terms of reliability and to dismiss what he deems of no importance for proving that the defendant has committed the offence he is charged with. The decision on the selection and assessment [of evidence] cannot be challenged in cassation.

However, the CCP does curtail this freedom in some respects, for it contains several rules on minimum evidence. The legislator deemed these rules necessary to ensure that the material truth would be found and (hence) miscarriages of justice prevented. Reliance on one source of evidence was considered to entail too great a risk in those respects. Therefore, minimum evidence rules constitute a prohibition against convicting on the basis of one means of proof.

The first of these rules is laid down in article 341(4) CCP, which provides that the judge may not base his decision that the defendant committed the act as described in the indictment exclusively on statements by the defendant himself. Thus, a confession alone is not enough; there needs to be at least one other means of proof available. Secondly, article 342(2) CCP lays down the same notion concerning statements by one witness. It provides that the judge may not decide that the defendant committed the act described in the indictment exclusively on the basis of statements by one witness. As it is this rule that bears the closest resemblance to the Scottish corroboration rule and is therefore this report’s topic, it is discussed in more detail in section 18.3. Although the prohibition of conviction on the basis of a confession only and the prohibition of conviction on the basis of one witness’s evidence only are laid down in separate provisions, these rules have the same rationale and are therefore applied similarly. Requirements developed in the case law as to the unus testis, nullus testis rule apply to article 341(4) as well. A third rule is laid down in article 344(2) CCP, which provides that a judge is allowed to base his conviction solely on a police officer’s report; it constitutes the exception to the prohibition of one source evidence. The risks involved in allowing only a confession or only one witness’s testimony to ground the conviction were assumed to be practically absent as to police reports. Police officers are assumed to be neutral and trained observers, who report immediately after their observation. Finally, article 344a(1) CCP states that “a judge cannot base his decision solely or decisively on documents containing the statements of anonymous witnesses”. Article 344a(4) CCP states that a judge cannot base his decision solely on statements made by witnesses who have an agreement with the Public Prosecution Service (PPS) based on
article 266h(3) (a fellow suspect testifies as a witness in the suspect’s case and in exchange the PPS will ask the judge for a lower sentence than he would have otherwise received) or article 266k CCP (a convict testifies as a witness in the suspect’s case and in exchange the PPS will advise the court to lower his sentence when the convict petitions for a pardon). Article 344a CCP’s text indicates that it is a codification of the case law of the European Court of Human Rights (ECtHR).

Ending our overview of the rules of criminal evidence, we need to briefly address the question of the object of the evidence: what exactly needs to be proven? The provisions cited above each contain the term “indictment”, which is a central notion in Dutch law on criminal procedure. We have chosen to use the term “indictment” as translation of the Dutch “tenlastelegging”, though we are aware that in some contexts the term “charge” or “count” would perhaps be more appropriate. The term “tenlastelegging” indicates the document containing the allegation(s), but also each separate allegation (each “count”), being a description of the historical act the defendant is alleged to have committed, which is phrased in the terms of the criminal offence he is charged with. What we mean by “indictment” in the context of the evidence is the description of when, where and under which circumstances this act was allegedly committed. The elements of this description are the facta probanda; each element of this indictment has to be proven by statutory means of proof. Article 350 CCP, which lists the questions the court has to answer in its judgment, determines the first issue to be resolved: “is it proven that the defendant has committed the act as described in the indictment?” Thus the judge’s evidentiary work consists of assessing the evidence (found in the dossier and during the trial): is it reliable?; is it all in all sufficient to prove that the defendant has committed the criminal offence as indicted?; and has it convinced him of the defendant’s guilt?; writing down his decision in the judgment and grounding it by listing the statutory means of proof which together cover all elements of the indictment. As will become clear in our discussions below, only in specific situations is the court obliged to provide additional reasons (on top of the listing of the evidence) for its evidentiary decision.

18.3 Witness evidence

Witness evidence and the de auditu tradition

Article 342(1) CCP defines “statement by a witness” as the “declarations by a witness in court on facts or circumstances which he has observed or experienced himself”. This implies that 1) only oral testimony at trial, 2) concerning the witness’s own observations or experiences qualifies as statutory witness evidence. These two implications have been taken down in the Supreme Court’s “De Auditu” decision of 1926. In this case, the conviction was based primarily on the depositions of two witnesses; one had made a statement to the police telling them what the defendant had told her, which was written down in a police report, the other witness testified in court about what the alleged victim had told her. The Supreme Court allowed the use of these two statements in convicting the defendant, reasoning that the police report was a statutory means of proof which obviously could be used in evidence, and that the statement by the witness in court constituted a statutory witness statement as well since she had testified to what she “had heard herself”. Enough statutory evidence being available, the court was at liberty to use it as it saw fit. “Neither the

7 Corstens and Borgers, Het Nederlands strafprocesrecht (n 3) 560.
8 The CCP does not contain a definition of “witness”.
9 Supreme Court 20 December 1926, ECLI:NL:HR:1926:BG9435.
statutory provisions, nor its system, nor its history” prohibited the court basing the conviction in substance on the defendant and the victim (both absent), as what they had said had been communicated to it by the two “de auditu” means of proof. This decision is regarded as one of the, if not the, most significant decisions in Dutch criminal procedural law, setting off the much maligned and much cherished “de auditu tradition” under which witnesses do not have to appear in court for their statements (whether including hearsay or declaring on their own observations) to be used in evidence. Instead, statements that witnesses have made to either the police or an investigating judge and which have been written down in an official report can, and therefore usually are, used in evidence. Police and judicial reports statutorily have the same evidential value as statements made in court and the judge is free to decide whether to use them as evidence and to what extent. Even though in the De Auditu judgment the Supreme Court warned the courts to use de auditu statements only with caution, this has not been an obstacle to the development and continued practice of the de auditu tradition. When Dutch lawyers speak of a “witness statement” they can be referring to either oral testimony in court, or to a deposition by the witness written down in a (police) report.

This practice is clearly contrary to the ECHR’s principle (in the context of article 6(3)(d) ECHR) that all evidence must be produced at a public hearing in the presence of the accused with a view to adversarial argument. The ECHR is however not as strict as this principle would have us believe, as long as a conviction is not based “solely or to a decisive degree” on depositions by a witness whom the defence has had no opportunity to question (and even to this minimum rule exceptions have been allowed).

This means that only in cases in which out-of-court depositions by a witness – the de auditu practice – form the evidence on which the conviction of the defendant is exclusively or decisively based does the Dutch practice constitute a problem. The Dutch rule of unus testis, nullus testis would seem to be a safeguard preventing such contravention of the ECHR. Our discussion of the rule will clarify that, although preventing convictions based on one witness alone, the case law does not allow for the general conclusion that the rule prevents convictions based decisively on one witness. The Supreme Court has implemented the ECHR “sole or decisive” rule by ruling that statements by a witness who has not been and cannot be questioned by the defence can only be used in evidence if the involvement of the defendant in the offence is sufficiently supported by other evidence, which has to support those elements of the witness statements that are contested by the defence.

**The unus testis, nullus testis rule**

As explained above, the unus testis, nullus testis rule finds its rationale in the prevention of miscarriages of justice which might occur if the court were allowed to convict a defendant on the basis of depositions by one witness, who might be lying, mentally disturbed, have observed incorrectly or have a flawed memory. By requiring at least two means of proof, the risk of wrongful convictions is diminished to an acceptable level. The Supreme Court in its turn finds the rule a

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10 Corstens and Borgers, *Het Nederlands strafprocesrecht* (n 3) 700.
11 Among many others: ECHR 15 December 2011, *appl.nos.* 26766/05 and 22228/06 (*Al-Khawaja/Tahery v. the United Kingdom*), para. 118.
12 For further discussion of this principle, see ch 8 (hearsay evidence) and ch 17 (fair trial rights and the convergence of evidential rules in Europe).
14 Corstens and Borgers, *Het Nederlands strafprocesrecht* (n 3) 713.
safeguard for “the soundness of the decision on whether there is sufficient evidence for the indictment”.\(^{15}\)

Although the text and background seem fairly clear, the content of the rule depends on what is required of the evidence to be used besides the witness statement. This can only be found in the case law in which the Supreme Court assesses the application of article 342(2) by the criminal courts.

This case law firstly clarifies that the second means of evidence does not have to be evidence for the element(s) of the indictment that the witness statement proves. The other evidence does not have to prove any particular element of the indictment; the Supreme Court has consistently held that the entire indictment needs to be proven by at least two means of proof.\(^{16}\) In conclusion, as long as every element of the indictment is proven by a (any) means of proof and there are two means of proof in total that each prove some element(s) of the indictment, the conviction cannot be challenged on the basis of article 342(2).

Secondly, despite the fact that the statutory law only lists means of proof, the Supreme Court actually requires two grounds of proof.\(^{17}\) The second means of proof may not come from the same source: a second statement by the same witness or hearsay statements by others testifying that the witness has told them what he or she has seen or experienced are not regarded as a second means of proof in the context of the unus testis, nullus testis rule. The same seems to apply if others testify to the witness’s emotions, e.g. when confronted with the defendant. An example is a case in which the defendant was convicted of robbing someone in the street, the evidence consisting of a statement by the alleged victim and a report by a police officer which reported that the victim had recognized the defendant when shown a picture and had started crying when she saw this picture. The Supreme Court found the conviction to be based exclusively on statements by the witness and thus to be contrary to article 342(2) CCP.\(^{18}\) It can be assumed that this also applies the other way around. If one and the same report by a police officer contains statements by multiple witnesses, it is unlikely that the Supreme Court would come to the conclusion that a second means of proof is lacking.

Although the unus testis, nullus testis rule statutorily applies to the witness statement as it is defined in article 342(1) (the statement in court), while article 344(2) allows for a conviction to be based exclusively on a police report, the latter provision does not apply in so far as the police report contains a statement by the witness.\(^{19}\) As the discussion of the case law below shows, in the context of the unus testis, nullus testis rule the Supreme Court does not differentiate between an in-court witness statement and witness depositions laid down in police reports.

The Supreme Court has traditionally not required much more of the second means of proof. Therefore, convictions were possible even absent eyewitnesses and non-testimonial evidence. Besides the essential statement (by the alleged victim or – see article 341(4) – the defendant


\(^{17}\) B de Wilde, “Bewijsminimumregels als waarborgen voor de waarheidsvinding in strafzaken?”, in J H Crijns, P P J van der Meij and J M ten Voorde (eds), De waarde van waarheid. Opstellen over waarheid en waarheidsvinding in het strafrecht (2008) 274.

\(^{18}\) Supreme Court, 23 May 2008, ECLI:NL:HR:2008:BC7413, NJB 2008, 1229; see also Supreme Court, 26 January 2010, ECLI:NL:HR:2010:BK5597 in which the “second” means of proof was a police report reporting that the witness recognised the defendant in a mirror confrontation and was startled by seeing the defendant.

\(^{19}\) Corstens and Borgers, Het Nederlands strafprocesrecht (n 3) 720.
confessing) only a document or testimony attesting to a formal or subsidiary element of the indictment (such as the date, location, formal capacity) was needed. A conviction for sexual abuse of a minor could be grounded on the statements by the minor and other evidence attesting to the date of birth and the location of the offence. An example of this approach in the context of article 341(4) is the conviction, upheld by the Supreme Court, of a postman who was prosecuted for unlawfully appropriating the letters of others, an offence that could statutorily only be committed by employees of the post office. The first means of proof used was a confession by the defendant, the second was a statement by his employer declaring that the defendant was a postman at the time of the offence.21

This approach to article 342(2) CCP has been strongly criticised on the basis that it is too lenient, causing the article to lose its safeguarding character. The rule was said to have become “a dead letter” and “completely ripped of its soul”.22 Authors have however not lost all interest in the topic. De Wilde has made concrete suggestions for reform, arguing that in cases such as the one about the postman, besides the second means of proof attesting to a formality, a third means of proof ought to be required. This should not apply in cases of sexual offences, as that would make convictions almost impossible.23 De Wilde finds that the Supreme Court should generally require a “substantive relation” between the first and second means of proof. The second means of proof need not to confirm the witness statement, but “the content of the second means of proof has to have a connection with the content of the first means of proof”.24

DEVELOPMENTS IN THE CASE LAW

18.4 Case law of 2009

The 30 June 2009 cases

In two cases decided on 30 June 2009, the Supreme Court seemed to have changed its approach. In the first case, the defendant was accused of threatening to kill the witness on 10 May 2005 in Gouda if she were to leave his uncle. The Court of Appeal had based its conviction on a statement by the witness in which she claimed that the defendant had threatened her as described in the indictment, and that this had taken place in Gouda. The second means of proof was a statement by the defendant that he visited his uncle’s in Gouda that day.

On the basis of the longstanding case law this evidence would have been considered to fulfil the requirements of article 342(2); there were two means of proof, from different sources, for the entire indictment: one proving that the defendant had threatened the witness in Gouda, and the other proving that the defendant was at his uncle’s in Gouda that day, confirming only the date and the town mentioned in the indictment. The Supreme Court decided otherwise, holding that “the

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21 Case mentioned by de Wilde (n 17) at 280.
23 de Wilde (n 17) at 288-289.
24 At 288.
evidence for the indictment can only follow from the witness statement, since the... means of proof b [the defendant’s statement] provides insufficient support [emphasis added] to the witness statement”. Here, the Supreme Court requires something more than before: in order to conform to the unus testis, nullus testis rule, the second means of proof has to provide “sufficient support” to the witness statement.

In the second case of 30 June 2009, the Court of Appeal had convicted the defendant for raping his ex-partner while she was recovering in hospital from giving birth to their child. The Court of Appeal has based its decision on several means of proof, the first being a statement by the alleged victim that she was lying in her hospital bed after giving birth to her daughter, that the defendant entered her one-person room and she tried to push him away with her left arm, which was still attached to an IV at the time, after which he had climbed on top of her and raped her. Furthermore, a police report in which the officers describe the photos copied from the album of the victim, showing the victim lying in a hospital bed with an IV attached to her left arm. These pictures were shown to the head of the obstetrics department, who recognized the room on the picture as the where the victim had been treated, and confirmed that this was a one-person room. The last means of proof used was the defendant’s statement that he had a compelling need for sex, and once started, would perhaps not pick up on any signals. The Court of Appeal reasoned that it had no reason to doubt the evidence it had used and had become convinced of the defendant’s guilt because he had claimed that he could not have raped the victim as she was lying in a four-person room, which turned out to be untrue. The Supreme Court referred to article 342(2) and held that the statements by the witness found insufficient support in the other means of proof.

Analysis of the case law in commentaries and literature

Bleichrodt (Advocate-General concluding in the first 30 June 2009 case (the Gouda-case)) found that there was sufficient evidence in this case, but an important part of that evidence had not been listed by the Court of Appeal, being the witness’s statement that the defendant came into his uncle’s house where she and the uncle were present. This statement located the witness in the same house as the defendant, and not merely in the same city. Bleichrodt, considering that the Court of Appeal must have forgotten to include this part of the statement in its judgment, advised the Supreme Court to uphold the decision, which it did not.

Knigge, concluding in the hospital case, recalls that article 342(2) CCP has lost much of its safeguarding function. He partly approves of this because otherwise the rule would leave certain victims, particularly those of sexual offences, without proper protection. In order to uphold the safeguarding character, Knigge finds that if a judge bases a conviction practically completely on the statements by one victim, he should provide reasons why he is justified in doing this considering the circumstances of the case. According to Knigge this reasoning cannot only reflect the reliability of the victim. Dreissen deduces from both 2009 cases that the criminal courts’ reasoning has become more important: they will need to explain the relation between the different means of proof. Remarkably so, as at the time article 342(2) was adopted, a proposal to incorporate a duty for the
judge to reason the evidentiary decision was declined. Unlike Knigge, Dreissen finds that one way to reason the decision would be to explain why the witness is held reliable.

18.5 Case law of 2010 – the new standard applied

The 26 January 2010 case

The defendant had been convicted of threatening to kill the alleged victim, showing him a knife and repeatedly yelling “I kill you”. The first means of proof was a deposition by the victim that while he was in his home in the asylum seekers’ centre, the defendant pounded on his door. He saw that the defendant had a knife and he heard him yell “I kill you”. After this the defendant left, but came back, still holding the knife and again threatening to kill the victim. The second means of proof was a report by the police that they had been called to go to the asylum seekers’ centre, where they met the victim who was very emotional and was shaking. The third means of proof was a police report attesting to finding a knife in the pocket of the defendant when he was searched shortly after the police arrived at the centre. The defendant’s statement at trial in appeal (in which he denied having threatened the victim) was also used as evidence in as far as he stated having been at the centre on the date mentioned in the indictment carrying the knife in his pocket and knowing that the victim lived there.

The Supreme Court phrased the following general considerations which would become standard considerations, repeated in the cases to come:

According to article 342(2) CCP – which covers the indictment as a whole and not a part of it – the conviction of a defendant for the act described in the indictment, cannot be based exclusively on the statement by one witness. This provision strives to safeguard the soundness of the conviction, since it forbids the judge to come to a conviction if the facts and circumstances referred to by the witness find insufficient support in other evidence. The question whether the rule on minimum evidence as laid down in article 342(2) CCP has been satisfied, cannot be answered in general, but demands an assessment of the specific case. The Supreme Court can therefore not give general rules on the application of article 342(2) CCP, but can only provide clarity up to a certain extent by deciding specific cases.

Turning to the case in question, the Supreme Court found that it could not be said that “the witness statement found insufficient support in other evidence”. It noted that in the present case “the relation between the witness statement and the other evidence was clear without further explanation”. The Court added that “unlike in the cases decided on 30 June 2009, there was not a too remote connection between the two”.

30 At 769-770.
32 At para 3.3 (emphasis added).
33 At para 3.4 (emphasis added).
The 15 June 2010 case

The Court of Appeal had convicted the defendant for committing acts of indecency with O, a client of his, while he was employed as her administrator and debt counsellor. The Court of Appeal had based its conviction on multiple means of proof: a statement by the defendant that he worked as an administrator and debt counsellor; a court decision applying the debt management program to O and appointing the defendant as her administrator; a statement by O at the appeal hearing, that she had come to the defendant’s office, where he rubbed her back from her left shoulder in the direction of her breasts; a statement by O to the police that she went to the defendant’s office to pick up some mail and that he had ordered her to walk to his office, and when she sat on a chair, he rubbed her back in the direction of her breasts; and a deposition by a friend of O’s, stating what O had told her and stating that O was very upset. After having repeated its considerations on the rationale and application of article 342(2) CCP, as first summarized in the 26 January 2010 case, the court concluded that the indictment could only be proven on the basis of O’s statements, since all other means of proof did not offer sufficient support to her statements. The Court of Appeal’s judgment was therefore considered to be contrary to article 342(2) and quashed.

The 29 June 2010 case

The defendant had been convicted of threatening to kill a woman and for forcing her to allow him to perform indecent acts with her while sitting next to her in a train. The Court of Appeal had based this conviction on three means of proof: the alleged victim’s statement that while she was sitting on the window seat in the train, a man in a white suit came to sit next to her and gave her his e-mail address. Later, he showed her his knife, pushed the knife against her and said “if I stab you slowly no one will notice”. The man kept his knife pressed against her and started caressing her breasts with his other hand. He also put her hand on his crotch. Because the man had a knife she felt forced to allow him to commit these acts. She also stated she recognised the defendant as the man who did these things to her. The second means of proof was a statement by the defendant declaring that it was possible that he took the train that day, that he had white suits and that he had once approached a girl in the train and had given her his e-mail address. The girl was sitting at the window and he sat next to her for the entire ride. The third means of proof was a statement by the victim’s mother that her daughter had called her crying and told her that a man in the train with a knife wanted to touch her.

The Supreme Court decided (responding to the defence) that the Court of Appeal had not been obliged to provide further reasons for its decision to find the defendant guilty. The means of proof that the Court of Appeal had used and listed in its judgment attested to there being sufficiently supporting evidence.

The 13 July 2010 case

The Court of Appeal had convicted the defendant for sexually abusing his partner’s minor daughter, based on the following means of proof: the defendant’s statement that he lived with the mother and

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her two children during the indicted time; the mother’s statement that her son M had told her that the defendant had kissed him on his penis and that her daughter had told her that she had to kiss the defendant on his penis as well; a statement by the daughter’s school teacher who declared that she had become more affectionate and quiet on occasions; and of course several depositions by the alleged victim regarding the abuse.

Responding to the defence, the Court of Appeal reasoned that there was no reason to doubt the victim’s trustworthiness, taking into account the very detailed statements concerning experiences and observations that are not normal for an eight year old girl.

The Supreme Court recalled the rationale and application of article 342(2) CCP case and added the following consideration: “It should be noted that, when applying in cassation the test whether the rule on minimum evidence of article 342(2) CCP has been fulfilled, it can be of importance whether the court of fact has provided further reasons for its decision that there is sufficient supporting evidence”. Turning to the case before it, the Supreme Court held that it should be assumed that the Court of Appeal had found the girl’s statements sufficiently supported by other evidence, but that that conclusion was, without further reasoning, not comprehensible. The additional reasons provided by the Court of Appeal concerned the reliability of her statements, but did not provide grounds for the conclusion that those statements were sufficiently supported by other evidence. The decision of the Court of Appeal was consequently quashed.

**The 5 October 2010 case**

The defendant in this case had been convicted of exposing his genitals in public. The means of proof listed by the Court of Appeal were: a statement by witness B saying that her brother had dropped his key in a catch pit and was trying to get it out, while she and a friend of hers were watching; that a man walked towards them, and then walked closer to her and stood behind her and showed her his genitals; a second statement by B that she had recognized the man while she was driving in the car with her parents; a statement by B’s brother G, in which he declared that a man came to stand by them and that at a certain point he saw his sister and her friend walking away from the man, showing disgust on their faces. After this, his sister told him that the man had shown her his penis; and the defendant’s statement that he saw a boy and two girls standing close to a catch pit, that he walked towards them and stayed there to help look for the key. While he was doing this, he stood close to the girl that reported him. The Court of Appeal held that it did not doubt the reliability of B’s statements and that the defendant’s statement supported her statement.

After recalling the rationale and application of article 342(2) CCP, as well as the possible relevance of criminal courts explaining their finding on the question of sufficient support, the Supreme Court held that “it cannot be said that the witness’s statements find insufficient support in the other means of proof”.

**Analysis of the case law in commentaries and literature**

The case law of 2010 is essential, since it makes clear that a new, stricter, standard has come into being. According to Aben (the Advocate-General concluding in the 26 January 2010 case about the 37 Supreme Court, 5 October 2010, ECLI:NL:HR:2010:BN1728, NJ 2010, 612.
asylum seekers’ centre), this means that the Supreme Court now no longer tests only whether there is sufficient evidence in a quantitative way, but also tests the sufficiency in a qualitative way. Borgers suggests that the criterion “a not too remote connection” between the principal witness statement and the other means of proof (used in the 26 January 2010 case in the context of explaining why in the 30 June 2009 cases the rule was not fulfilled) is not a new or different criterion, but is a different phrasing of the requirement of “sufficiently supporting evidence”. 38

In his commentary to the 13 July and 5 October cases, Borgers criticises the Supreme Court for not explaining its decisions properly. Although the Supreme Court, being a judge of law not of facts, cannot question the facts as established by the trial judge and only assesses the comprehensibility of the trial judgment on the basis of the evidentiary grounds provided by said judge, it still is its task to reason its decisions as clearly as possible. Now that the comprehensibility test as to article 342(2) implies a two-step assessment: establishing the relation between the different means of evidence used, and then determining whether this relation fulfils the criterion of “sufficient support”, both steps should be clarified by the Supreme Court. 39

In the context of the frequently raised question whether the defendant’s statement that he was there (was present at the scene of the crime) would be sufficiently supporting evidence in terms of article 342(2), Borgers rightfully criticises the Supreme Court’s lack of explanation in its decision in the case of 5 October 2010 (publicly showing genitals). 40 It may seem that, according to the Supreme Court, the supporting evidence was the defendant’s statement that he was present at the catch pit (the Court of Appeal expressly referred to his statement as supporting the statement by the primary witness and the Supreme Court added nothing to this). However, it is possible that the Supreme Court, when deciding that there was sufficient supporting evidence, had the statement of the brother in mind, who declared that the two girls showed disgust. Borgers recalls that declarations as to emotions do not constitute a second means of proof, but thinks that this may not apply here, since the brother observes them before his sister tells him what is wrong. Another possible alternative line of thought by the Supreme Court that Borgers suggests is that the brother’s observation of disgust is not in itself enough but is supportive enough in combination with the girl’s and brother’s deposition that the girls walked towards the boy and away from the man, implying that the man must have stood at some distance and hence could not have been searching for the key, as he himself had stated. 41 This is, of course, all speculation but it shows that (and why) it is impossible to draw general conclusions as to whether, for example, the presence of the defendant would be enough to constitute sufficiently supporting evidence.

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39 At para 4.
41 At paras 4-5.
18.6 Case law of 2011 – the importance of providing reasons

The 4 January 2011 case

The defendant had been convicted of threatening K during a telephone conversation with N. The Court of Appeal used the following means of proof: the statement by N declaring that the defendant had threatened K while speaking with him on the phone; a statement by T stating that N had told her that the defendant threatened K; a report by a police officer who visited the defendant after N had filed a complaint against him, reporting that the defendant had told him that he had had an argument with N in which he became very angry. The defendant had however not told the officer what he had said during the argument and had denied having threatened K. The Court of Appeal explained that it regarded the defendant’s statement that he became angry as a confirmation of the telephone conversation as described by N and found it unlikely that the suspect had not threatened K. The Court had therefore become convinced that the defendant had indeed threatened K during his telephone conversation with N.

The Supreme Court again repeated its standard considerations, including that the court of fact’s reasoning as to the question of whether there is sufficiently supporting evidence could be of importance. The Supreme Court held that the Court of Appeal had provided reasons for its finding of sufficient supporting evidence, and found its judgment in accordance with article 342(2) CCP.

The 25 January 2011 case

The defendant, a dentist, had been convicted of forcing his assistant to allow him to commit acts of indecency. The conviction was based on: the defendant’s statement that the alleged victim had worked for him as a dental assistant; a report by a police officer, reading a text message sent to the witness by the defendant, which read: “Hi sweetheart... Text me and I am trying to speak to you. X.”; the alleged victim’s statement describing the indecencies that the defendant had committed in the period that she worked for him and describing how he had threatened to fire her and the text messages he had sent her; a statement by her mother who sets out what the victim had told her about the indecencies and declares that she heard the defendant call her daughter “sweetie” during a telephone conversation; a statement by the victim’s ex-boyfriend that she told him what had happened. The Court of Appeal held that the statements by the mother and ex-boyfriend supported the victim’s, and thereby confirmed the reliability of her statements. The Court further considered that, in deciding that the indictment was proven, it had taken into account the defendant’s statement that the witness was his assistant in the indicted period of time, and that, as follows from a text message read and reported by a police officer and a conversation heard by the mother, he had called her by inappropriate nicknames.

After repeating its standard considerations on the rationale and application of article 342(2) CCP, the Supreme Court stated that it could not be said that there was insufficiently supporting evidence for the witness’s statements.

The 29 March 2011 case

The defendant had been convicted of stealing about €175 from a taxi driver and of threatening him in order to commit the theft. The decision was based on: the alleged victim’s statement that while he was working as a taxi driver, a man got into his car near a café and told him where he wanted to go and that he was called S. The victim furthermore stated that when they arrived in the Volderstraat via the Nuenenseweg, the defendant had threatened him by saying that he had a gun and yelling that he wanted money, after which he took the money that the driver put down and got out of the car; the defendant’s statement declaring that he got into a taxi near a café, that he told the taxi driver where to go and what his name was and that he got out of the taxi at the corner of the Nuenenseweg and the Volderstraat; a police report that they got a call at 2:07 AM from someone that he had been robbed by a white male of 25 years old, with short blond hair, who had claimed to have a gun in his pocket. At 4:40 AM they arrested the defendant. The Court of Appeal stated that the victim’s statement in court was largely in line with his earlier deposition and that it considered this statement reliable, since it was supported by the defendant’s statement and by the fact that he had immediately called the police. The fact that the police had not found a gun or money on the defendant when he was arrested did not falsify the victim’s statements.

The Supreme Court concluded, having repeated its standard considerations on the rationale and application of article 342(2) CCP, that the Court of Appeal had provided reasons for “why and how” the statements of the witness were supported by the other evidence; the Court of Appeal’s judgment was therefore in accordance with article 342(2) CCP.

Analysis of the case law in commentaries and literature

The case law of 2011 is particularly interesting because it shows that the Supreme Court’s consideration that the reasoning of the criminal courts as to sufficiently supporting evidence, can be of importance for its decision whether the requirement laid down in article 342(2) has been fulfilled, has been understood by the courts. In all but one of the cases, the Supreme Court found the requirement fulfilled, referring to the Court of Appeal’s reasoning. The great value of providing these reasons (and thereby going beyond the standard requirement of explaining the evidentiary decision by just listing the means of evidence used) is that particularly in cases in which the evidence is scarce, explicit application of the unus testis, nullus testis rule allows the Supreme Court to really assess the quality of the evidentiary decision.

The Supreme Court’s decision of 25 January 2011 (about the dentist and his assistant) is interesting because the Advocate-General (Machielse) had advised quashing the decision for not conforming with article 342(2). He recalls that the hearsay statements by the mother and ex-boyfriend can only serve as evidence for the reliability of the victim’s statements. The Supreme Court cannot have disagreed on this; from its case law it is evident that depositions that only attest to what the primary witness has told others do not fulfil the requirement of the unus testis, nullus testis rule (see the case of 13 July 2010). Machielse, however, seems to consider the defendant’s statement the only relevant means of proof – not being hearsay and proving part of the indictment (the part reading that the alleged victim was his assistant) - but finds it not to “relate strongly enough to the core of the indictment”. We must assume that, as from 30 June 2009, the Supreme Court also finds this

insufficient support. The disagreement between Machielse and the Supreme Court on this case seems to concern the relevance of the other evidence to which the Court of Appeal refers (the police reading the text message and the mother overhearing the nicknames on the phone). Although Machielse does remark that this is independent evidence for the victim’s statements that the defendant called her “darling” and “sweetie”, he finds this support irrelevant, because these means of proof do not prove any part of the indictment (which did not include these nicknames but described how and where he had touched her and what he said in threatening to fire her). Machielse thus concludes that all of this evidence (whether hearsay or not) merely supports the reliability of the victim’s statements. In finding the requirement of article 342(2) fulfilled, the Supreme Court on the other hand seems to regard the independent support for the victim’s statements concerning the nicknames as the required sufficiently supportive evidence for the witness’s statements. Again, absent any reasoning by the Supreme Court, every conclusion is more or less speculative. Read against the background of Machielse’s opinion, however, the decision seems to imply that the “new” requirement of sufficient support can be fulfilled separately from the longstanding requirement that the indictment be proved on the basis of, next to the primary witness’s statement, at least one other (independent) means of proof. That would mean that the sufficient support requirement is not to be seen as the new substantive content of the old (previously formal) requirement, but as an obligation in itself for the criminal courts to explain why they have found that the witness statement (and thus the essence of the indictment) is probably true with reference to other sources.

The Supreme Court decisions in 2011 evidence that the unus testis, nullus testis rule still does not mean that the essence of the allegation – the core of the indictment – can only be proved by two independent means of proof. Both the actual touching in the dentist case and the actual threatening during the telephone conversation was not part of any other means of proof. Therefore the question seems to be: is the other evidence supporting enough to counter the risk of a miscarriage of justice inherent in the heavy reliance on this one witness? It seems to be primarily up to the courts to convince the Supreme Court that they have sincerely asked themselves this question; the Supreme Court does not feel obliged to help provide the answer.

18.7 Case law of 2012

The 6 March 2012 cases – back to the old days?

On 6 March 2012, the Supreme Court decided three different cases, all of which are very significant, as they have caused considerable confusion and disappointment among legal commentators. In the first case, the defendant had been convicted of kidnapping the alleged victim together with his two brothers. He denied having participated in the kidnapping. Although the public prosecutor at trial argued that there was not enough evidence to convict the defendant, the Court of Appeal reasoned that article 342(2) does not forbid proving that the defendant was indeed one of the perpetrators on the basis of one witness statement only, since in these cases the statements found sufficient independent support in other means of proof (e.g. the coincidental finding of the victim’s blood at the place where he was kept, the phone calls the victim had made to the police from the back of the car).

The Supreme Court repeated its general considerations on article 342(2) and held that the Court of Appeal, by stating that it was allowed to base its decision that it was proved that the defendant was one of the kidnappers on the victim’s statements only, had merely “expressed that the unus testis, nullus testis rule concerns the indictment as a whole and not a part of it, and that it is especially important that the facts and circumstances about which the witness has declared do not stand on their own, at the same time not finding insufficient support in the other evidence.” The Court of Appeal’s decision was upheld.

In the second case, the defendant had been convicted of sexually assaulting his granddaughter several times while she was between six and eight years old.46 Besides the statements by the alleged victim, the Court of Appeal based its decision on the statement by the mother of the victim that she, while she was cleaning her daughter’s room, found a page ripped from her daughter’s diary on which she had written that she had to have sex with her grandfather and that he thought she was the prettiest in the family; a statement by the defendant’s former employer that several sex tapes had been found stored in a small warehouse previously used by the employer’s company (the victim had declared having accompanied her grandfather to a warehouse and having seen sex tapes there); a statement by a witness saying that the victim had told her about the abuse; statements by both the mother and the defendant stating that the victim had stayed over at the defendant’s house several times during the period of time mentioned in the indictment. In response to the defence about article 342(2), the Court of Appeal considered that it was of importance that the note was found by coincidence, and that only after that the victim had started to talk about the abuse. The note and the consequent statements by the victim were held to be supported by the statements by her mother and the defendant, which confirmed that the sleep-overs at the defendant’s house about which the victim had declared, had taken place. The Supreme Court held that “it cannot be said that the witness’s statements find insufficient support in the other evidence”.

Finally, in the third case the defendant had been convicted of stealing a scooter belonging to K together with B.47 The scooter was found having been left behind by the two persons driving it after they had hit a police officer with it. Co-defendant B had declared where he had stolen the scooter together with the defendant and also that they had hit a police officer with it and had ran off. The police officer had reported that he recognised B as one of the two persons involved in the hit-and-run. K had declared that the scooter the police showed her was the scooter that she had reported stolen; also, the license plate was registered to her.

The Supreme Court stated that the co-defendant’s statement did not find insufficient support in the other evidence, “considering that it entails that the scooter which B had left behind after the confrontation with the police and on which he has declared turned out, according to its registration and K’s depositions, to be K’s”.

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Analysis of the case law in commentaries and literature

In his Commentary on the three cases, Schalken shows disappointment. He strongly criticises all three decisions on the basis of the conclusions that have been drawn from previous case law: the victim’s statements about the sexual abuse by her grandfather cannot be supported by the diary note because both means of proof stem from the same source, which leaves as supporting evidence the defendant’s statement that she often slept at her grandparents’ house, which in itself does not qualify as relevant for the evidence of the abuse; in the kidnapping case, the finding of the victim’s blood together with the other objective indications only prove the truth of the victim’s statements, but do not point at the defendant as one of the perpetrators; in the scooter theft, there was convincing evidence that the scooter had been stolen, but there was no evidence available to support the co-defendant’s statement that the defendant had stolen the scooter together with him. According to Schalken the Supreme Court seems to regard the two required means of proof as ‘communicating vessels’: the evidentiary strength required of the supporting evidence depends on the reliability of the witness evidence and vice versa. Borgers comes to a similar conclusion. The kidnapping case provides a rare example of the Supreme Court saying something in general terms about the unus testis, nullus testis rule. The need to downplay the Court of Appeal’s stance, strongly criticised by the Advocate-General, moves the Supreme Court to formulate what is particularly important and thus should be the focus in applying article 342(2): the facts and circumstances about which the witness has declared must not stand on their own and must at the same time not find insufficient support in the other evidence.

The decision in the abuse by the grandfather case may not be a real deviation from the previous case law. Schalken’s conclusion that the sleep-overs are the only remaining support as the diary entry is not independent evidence (coming from the same source as the original statement), can be questioned, because the disallowance of “same source” evidence as support may not be applicable here. The risk that the witness has (for whatever reason) made up the story about what happened or who was involved, or has flawed memories may well be assessed differently in the case of the finding of the diary entry (as long as it can be assumed that it was indeed found coincidentally and was not planted there): it may be regarded as unlikely that the girl had made up the abuse, considering that she wanted to keep silent. The “communicating vessels” theory may have been exercised in this case, but the case may also be referred to as grounding the idea that supporting evidence is ultimately a strong form of reliability evidence.

In the other two cases decided on 6 March 2012, the central question was whether the defendant had in fact taken part in an offence that was as such not contested. In the kidnapping case, there was clearly enough evidence for the kidnapping as described in the indictment, but only the victim’s statement implicated the defendant. The Advocate-General concluding in this case recalls that the defendant was not an outsider but the two kidnappers’ brother and he finds supporting evidence in the fact that one of the other perpetrators had used the defendant’s phone when calling the victim to arrange a meeting (during which he was to be kidnapped). He however strongly disapproves of the Court of Appeal’s stance (mentioned above) and therefore advises the Supreme Court to quash the conviction. The Supreme Court rephrases, but upholds the decision. Again, we cannot tell whether the Supreme Court actually found the evidence of the kidnapping itself supportive enough, or also

has considered the use of the defendant’s phone in the context of the kidnapping. The former interpretation would be objectionable, because that would ultimately mean that, as long as there is independent evidence of the offence having taken place, anyone pointed out by the witness could be convicted of it. The third case (scooter theft) however seems to prove this interpretation correct. There was no evidence implicating the defendant except for his co-defendant’s statement; there was not even evidence that the scooter had been stolen by two persons.

18.8 Case law of 2013

The 12 February 2013 case

In this case, the defendant had been convicted of sexually assaulting his niece, then nine years old, 15 years earlier. The Court of Appeal had based its conviction on the alleged victim’s statement about how and when the defendant touched her; a statement by her mother, that her daughter had told her what the defendant had done; a statement by the girl’s aunt, that she had seen the victim and her own daughter crying and after this the victim had told her what had happened; a statement by the victim’s niece, in which she stated that her niece had told her about the abuse. The Court of Appeal held that it found the victim’s statement reliable and that her statement, together with the statements by the mother, the aunt and the niece proved that the defendant was guilty.

The Supreme Court held that the judgment by the Court of Appeal was not comprehensible, as the means of proof listed in the judgment as well as the reasoning by the Court of Appeal, which only explained its holding the victim’s statement reliable, provided insufficient support to the witness’s statement.

The 2 July 2013 case

The defendant had been convicted of forcing and tricking his girlfriend into prostitution for his own profit. The Court of Appeal reasoned its decision by pointing out that supporting evidence could be found in several witness statements: the statement by the alleged victim’s mother in which she declared that in the time that her daughter had a relationship with the defendant, she worked as a prostitute; the statement by K that she saw the victim crying a lot on her first few days of working as a prostitute; the statement by E that the victim had told her that she and the defendant were saving money and that the defendant collected this, and that the victim had fought with a customer, cried and screamed “I cannot do this anymore, I do not want this anymore.”

The Supreme Court repeated its standard considerations on article 342(2) CCP leaving out, remarkably, the part saying: “The question if the rule on minimum evidence of article 342(2) CCP has been satisfied, cannot be answered in general, but demands a judgment of the specific case. The Supreme Court can therefore not give general rules on the application of Article 342(2) CCP, but only provide clarity up to a certain extent by deciding specific cases.” The Supreme Court held that the Court of Appeal had provided sufficient reasons for its decision that E’s and K’s statements supported those by the victim. The judgment was thus in accordance with article 342(2) CCP.

50 Supreme Court, 12 February 2013, ECLI:NL:HR:2013:BZ1890, NJ 2013, 279.
The 12 November 2013 case

The defendant had been convicted of sexually abusing his partner’s daughter on multiple occasions. The evidence used in this case consisted of: the alleged victim’s statement about the abuse; a statement by a psychologist that the girl seemed to be telling the truth during the police interview; a statement by the victim’s mother declaring that when she told her daughter that she could always tell her anything, she started crying and said that her mother would never believe her. Her mother asked her to write it down, the daughter did this and then her mother learned about the abuse; a notebook belonging to the victim in which the abuse was described to her mother; a statement by the mother that on New Year’s Eve, after the children had gone to bed, she had gone to her neighbours to have a drink. Her daughter then called her crying and asked her to come home. Before she could return, her daughter showed up at the neighbour’s wearing only underpants and wrapped in a blanket. After this she told her mother that the defendant had shortly before abused her; a deposition by the victim’s father, stating that he was at a New Year’s Eve party at the neighbours of his ex-wife and had heard his daughter phoning her mother to come home and had then seen her at the door wearing a blanket; a deposition by the father’s partner, stating that she had seen the victim crying and wearing a blanket; a statement by the defendant saying that on New Year’s Eve he was at his partner’s house alone with the children, had noticed that the victim had left and saw her return together with her mother and wrapped in a blanket. The Court of Appeal stated that the witness statement alone did not constitute sufficient evidence for a conviction but that in cases of sexual offences “relatively less strong supporting evidence in combination with the victim’s statement can constitute sufficient legal evidence for the indictment”.

The Court of Appeal stated that it was clear that “something” had happened during that New Year’s Eve. It also declared that the victim’s and her mother’s statement were supported by a statement by B who declared that R had told her about the abuse of the victim by the defendant, which the victim had told her about. When B confronted the victim, she started crying and said that something happened on New Year’s Eve and that her mother did not believe her. Moreover, R’s statement supported the witness statements as well, since she declared that the victim told her about a letter that she had written to her mother.

The Supreme Court recalled its general considerations (again, leaving out the part about not being able to provide general rules). It further held that the Court of Appeal had reasoned that the witness’s statements were supported by several other witness statements. The Supreme Court noted that “it cannot be said that the witness statements which were used as evidence find insufficient support in the other evidence”.

Analysis of the case law in commentaries and literature

Concluding in the 12 February 2013 case, Knigge considers that the Supreme Court does not require the other evidence to support the core issue of the witness statement; it requires only that specific parts of the witness statement are supported by other evidence, in order to ensure that the statement does not “stand on its own”, but instead can be regarded as “embedded in a specific context that is confirmed by another source”. That was not the case here, since the other evidence

52 Supreme Court, 12 November 2013, ECLI:NL:HR:2013:1158.

did not provide any information on the situation in which the abuse had allegedly taken place. In his Commentary to the 12 February 2013 case, Reijntjes states that emotions should only be used as supporting evidence when they were witnessed shortly after the incident took place, comparing them to physical wounds. Reijntjes criticises the Supreme Court for continuing to be vague when it comes to the standard it applies, if there is one at all. “The Supreme Court... considers developing the law as its main task; then, let it develop the law!” Remarkably, in the next decision on article 342(2), the Supreme Court left out its standard consideration that it cannot provide general rules etc.

Reijntjes analyses that if the evidence decisively consists of one statement, the Supreme Court first checks whether the court of facts was aware of the risks involved in this, by explaining in its judgment why the unus testis, nullus testis rule does not prohibit deciding that the indictment has been proven. It then tests the quality of this explanation. We can assume that it continues to judge whether the submitted evidence actually offers sufficient support. However, its assessment of the case under consideration is only of a marginal character. According to Reijntjes, the Supreme Court only checks whether the judgment, taking the reasoning by the court into consideration, is comprehensible.53

18.9 Case law of 2014

The 22 April 2014 case

In the present case, the defendant had – amongst other things – been convicted of kicking the alleged victim in her stomach, while she was pregnant. This conviction was based on the victim’s statement and a statement by a neighbour that the victim had told him what happened and that he saw that she was “cramped up” while she was holding her stomach with both of her hands.

This time, the Supreme Court repeated its complete considerations (again including the part about not being to answers the question of fulfillment in general) on the rationale and application of article 342(2) CCP. Subsequently, the Supreme Court summarized the content of the second means of proof (the statement by the neighbour) and concluded that there was sufficiently supporting evidence.

Analysis of the case law in commentaries and literature

Advocate-General Bleichrodt emphasizes that evidence which makes a witness statement reliable, does not constitute supporting evidence for that statement. As the second means of proof concerns expressions by the witness, it does not qualify as supporting evidence; the fact that the neighbour made his own observations of verbal and non-verbal expressions does not alter this. Furthermore, “cramped up” is not clear; it can indicate both a physical and a psychological state. Bleichrodt concludes that the Court of Appeal has not motivated its decision on the existence of supporting evidence properly.55

18.10 Conclusion

In this report, the Dutch rule of *unus testis, nullus testis* has been discussed. The case law shows that it is quite hard to grasp what the Dutch rule exactly entails, although the text of article 342(2) CCP and its rationale seem clear: a conviction cannot be based exclusively on statements by one witness, because that would, according to the legislator, entail too great a risk of miscarriages of justice. The Supreme Court has always interpreted this rule formally and restrictively, requiring only a second means of proof providing evidence for any element of the indictment, and not a substantive relation between the witness statement and the other means of proof: article 342(2) refers to the entire indictment, not to any particular element of it. This means that there need not be a second means of proof for each element of the indictment and also, particularly, that the second means of proof does not have to confirm the core of the allegation (e.g. the actual assault, the actual threatening, the use of force). The Supreme Court did however require the second means of proof to originate in an independent source: it may not be hearsay (the criminal court may not rely on statements by others declaring no more than what the primary witness has told them as the other evidence), nor declarations about the principal witness’s emotions when telling others about the offence or recognising the defendant.

As from 2009, the Supreme Court applies a new, more substantive and therefore stricter, criterion in testing whether the requirement of article 342(2) has been fulfilled. The other evidence has to “sufficiently support” the witness statement. The first two of the five questions put to us by the academic expert group are answered in paragraphs 1) and 2) below; the answers to the questions what the rule entails and how it works in practice cannot be separated as the Supreme Court strives to clarify the rule by assessing its application by the criminal courts. The criticism and suggestions for reform are mostly discussed in paragraph 3). The fourth and fifth question are answered near the end of this conclusion, under 4) and 5).

*Defining unus testis, nullus testis*

The Supreme Court repeatedly holds that it cannot provide general rules on the application of article 342(2), but can only provide clarity by assessing concrete cases. In two decisions the Court has however come up with something of a definition of the *unus testis, nullus testis* requirement. In its landmark decision in the “Asylum Seekers’ Centre” case the Supreme Court explained why the 30 June 2009 cases (threat in Gouda and rape in hospital) did not provide sufficient supporting evidence for the witness statements: in those cases there was “a too remote connection” between the witness statement and the other evidence. Though not explaining very much, this does clarify that the support requirement should not be overstated, but at the same time calls for a substantive relation between the second means of proof and the witness statement. We can assume that the Supreme Court considered that its decisions to follow would provide the criminal courts with enough information to develop a feeling for the line to be drawn between “too remotely connected” or “not sufficiently supporting” on the one hand and “not too remotely connected” or “sufficiently supporting” on the other.⁵⁶

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⁵⁶ See, however, our conclusion in ‘Testing unus testis nullus testis and the problem of guidance by the Supreme Court’, below.
Furthermore, in one of the 6 March 2012 cases the Supreme Court highlighted that in applying article 342(2) it is of particular importance to ensure that the “facts and circumstances to which the witness testifies do not stand on their own”, nor “find insufficient support in the other evidence”. Knigge has convincingly concluded that this means that the witness statement should be embedded in a specific context that is confirmed by other evidence; consequently, the witness statement has to partly be confirmed by other evidence. This elaboration in terms of “context” and “embedding” emphasises that the (partial) confirmation of the witness’s declarations has to be relevant enough to justify the criminal court’s reliance on the witness testimony as to the parts that were not confirmed. If a means of proof confirms a part of the witness’s testimony, but is only remotely related to the witness statement in the context of the criminal offence (an example would be the defendant who stated that he was at his uncle’s house in Gouda that day and the witness statement that he threatened her in Gouda that day) it is not capable of embedding, or providing context to, the witness statement.

Conclusions and questions about unus testis, nullus testis

a. No complete or specific corroboration required

One conclusion can clearly be drawn from the case law: the unus testis, nullus testis rule has never required and still does not require confirmation of the most important parts of the witness statement: that the offence has taken place or that the defendant is the perpetrator. It merely requires that the facts and circumstances about which the witness has declared are at least partly confirmed by other evidence and that this other evidence has some relevance in the context of the case to be decided. The sufficient support criterion of the unus testis, nullus testis rule is – and there is no discussion about that – not to be equated to the requirement of supporting evidence in the ECtHR case law on article 6(3)(d) ECHR, as it has been implemented by the Dutch Supreme Court: depositions by an untested witness can only be used in evidence if there is sufficiently supporting evidence as to the parts of the witness’s declarations that are contested by the defendant; only then does the Supreme Court find the depositions by the witness not to be “decisive”.

b. “Same source” evidence is not allowed

The Supreme Court has consistently upheld the requirement that the witness statement can only be supported by evidence that is independent from the witness: hearsay and others testifying to the witness being emotional cannot support the witness statement. The independence requirement can be regarded as the most important aspect of article 342(2). However, some authors conclude that evidence originating from the witness and evidence of the witness’s emotions can never qualify as supporting evidence in terms of article 342(2). This conclusion must be rejected as too rigid. The Supreme Court seemed to at least approve of the finding of the diary entry by the alleged victim of sexual abuse by her grandfather to be held relevant, and it agreed on using as support the neighbour’s statement that the alleged victim of a kick in the stomach held her stomach with both

57 In his conclusion before the 12 February 2013 case.
58 Dreissen (n 29); Reijntjes (n 53).
59 Supreme Court 29 January 2013, ECLI:NL:HR:2013:BX5539, NJ 2013, 145 (post-Vidgen); Dreissen (n 29) at 769-770.
60 See the cases of 13 July 2010 and 12 February 2013.
61 Schalken (n 48); Bleichrodt (n 55).
hands and was “cramped up”.62 The risks in allowing “same source” and “emotions” evidence as support can be considered less apparent in these cases since the diary entry was read coincidentally and the emotion was witnessed right after the kick had allegedly taken place and consisted also of physical pain. There is probably some truth in Reijnjtes’ suggestion that emotions may be used as support of the statement that an offence has taken place if they are witnessed immediately after the alleged offence, because then they compare to physical injuries.

c. Differentiation between reliability and support?

Another, but very much related, notion that may be deduced from the case law is the requirement to differentiate between evidence that merely attests to the reliability of the witness statement and evidence that actually supports the witness statement. In some of the decisions discussed above the Supreme Court comes to the conclusion that the Court of Appeal had merely provided reasons for the reliability of the witness statement, and had thus not referred to evidence that sufficiently supports this statement.63 In literature, there has never been consensus as to the question whether evidence of the reliability can be used as supporting evidence.64 Analysing the case law discussed above, there seems to be some confusion about what constitutes evidence of the reliability of the witness statement. The case law only demands differentiation between reliable evidence and supporting evidence where hearsay statements were referred to by the Court of Appeal in its evidentiary reasoning; it is clear that these statements can only be used in evidence to reason the reliability of the witness testimony. The case law implies that it is not so much the object of the evidence (reliability or support) which should be differentiated, but the source of the evidence (same source or independent source). The 25 January 2011 case supports that conclusion. Whereas Advocate-General Machielse found that the nicknames shown by the text message and the phone conversation overheard by the mother, which were clearly used as support by the Court of Appeal, concerned only the reliability of the witness statement, the Supreme Court found there to be sufficiently supporting evidence in this case.65 Furthermore, in pointing out that in applying the rule it is of particular importance that the witness statement does not “stand on its own”, the Supreme Court emphasises even more the requirement that there be independent evidence for (parts of) the witness statement. All independent evidence seems in principle to qualify as supporting evidence. A fundamental differentiation between reliability and support seems ultimately impossible to make.

We believe that the meaning of the unus testis, nullus testis rule differs, and rightly so, somewhat from case to case, depending on the central evidential issue to be decided. The primary question in cases in which clear cut evidence of the offence or the defendant being the perpetrator is provided only by one witness (the alleged victim), is whether the court should or should not rely on the witness testimony in the face of the risks inherent in that reliance. The issue of reliability is therefore linked to the requirement of support. As the case law shows, in these cases it all comes down to justifying the reliance placed on the witness as to the core of the allegation. Therefore the unus testis, nullus testis rule requires that such reliance does not take place on the basis of the judge’s

62 See the cases of 6 March 2012 and 22 April 2014.
63 See the 13 July 2010 case and the 12 February 2013 case.
64 As discussed under “Analysis of the Case Law in Commentaries and Literature”, above.
65 The Supreme Court apparently finds certain evidence supporting that others think only prove the reliability. Schalken (n 48) says that the finding of the blood etc only prove the truth of the victim’s statements, but is not supporting evidence for the decision that the defendant participated in the kidnapping. For the Supreme Court, this evidence is supporting, considering that this means that the witness statement does not stand on its own.
subjective feeling that the witness is telling the truth but on the basis of independent evidence that gives (more or less) objective grounds to rely on the witness.66

d. Lenient approach in cases of sexual offences?

A large number of the cases in which the application of article 342(2) is challenged before the Supreme Court concern sexual offences; obviously in these cases the offence usually takes place in private and it is therefore notoriously hard to produce evidence besides the alleged victim’s depositions. As has been discussed above, this problem was regarded as one of the main justifications of the Supreme Court’s longstanding interpretation of the rule as requiring only (at least) two sources of evidence in relation to the indictment. Generally, legal scholars agree that criminal courts should be allowed to take a lenient approach towards unus testis, nullus testis in cases of sexual offences. Now that the Supreme Court has become more stringent, the obvious question is whether this new line will hamper the prosecution of sexual offenders. Vellinga (Advocate-General concluding in the 13 July 2010 case about sexual abuse of the daughter of the defendant’s partner) wonders whether exceptions to the rule should be allowed in cases of sexual assault of minors, as the ECtHR seems to have done in its case law on the right to examine witnesses as laid down in article 6(3)(d) of the Convention.67 He believes that this is impossible, as this would contravene the very objective of article 342(2) CCP to ensure a solid evidentiary ground for convictions. It would therefore be better to apply the criterion of sufficient support leniently.68

Despite the agreement among scholars, we cannot really conclude that the unus testis, nullus testis rule is applied differently in sexual offence cases. The case law clearly shows that the prohibition on using hearsay testimony and statements attesting to emotions as supporting evidence applies in cases of sexual offences just as well.69 Neither does the case law provide much support for the conclusion that the requirement of sufficiency of the support is applied more leniently than in other types of cases. Although it can be argued that most cases concerning other types of offences provided evidence of more substance (threat by phone; theft in taxi), that does not mean that the Supreme Court would not have approved of less – we need only refer to the 6 March 2012 cases about the kidnapping and the (most puzzling) scooter theft.

In the cases of sexual offences the central question is always whether the offence has taken place at all, to be decided against the background of the risk that the alleged victim might be lying about what happened between her or him and the alleged offender. Considering that everyone agrees that the unus testis, nullus testis rule may not be interpreted as a principle obstacle for conviction in those types of cases, the decision is – absent a confession, eyewitnesses and physical evidence – essentially based on the judge’s conviction that the abuse or assault did take place. Therefore, this conviction should be construed and justified by including and referring to objective evidence which supports the alleged victim’s statement; in these cases, article 342(2) can only mean presenting objective support for the reliability of the witness (the calling of nicknames; the finding of the note one day after a sleep-over at the grandparents, perhaps combined with the finding of the sex tapes about which the witness had declared). Our conclusion under c, above – that support evidence and reliability evidence cannot principally be separated – applies first and most strongly to this type of cases.

66 Knigge (n 28).
67 Vellinga refers particularly to ECtHR 2 July 2002, app no 34209/96 (SN v Sweden).
69 See the cases of 15 June 2010, 13 July 2010 and 12 February 2013.
The criterion of sufficient support can only mean that the other evidence supports the witness statement as to a part that is of relevance in the evidentiary decision that has to be made in the case at hand. That is of course why it is impossible to deduce general rules from the case law. For example, the question, raised by some authors, whether the presence of the defendant at the scene of the crime is enough supporting evidence, cannot be answered in general. In grounding the evidentiary value of the other means of proof, it can be helpful to have recourse to the different scenarios presented. Some authors are in favour of an application and reasoning of the rule in terms of discrimination between scenarios. Ideally, the required second means of proof has to discriminate between the indictment-scenario and the defence-scenario, however the Supreme Court does not require this. Although in some cases the other means of proof did in fact discriminate between the scenarios (the finding of the knife in the Asylum Seekers' case; the disgust on the girls' faces where the defendant claimed he only helped to find the key in the catch pit), in many other cases they obviously do not. Although in the case about the threat by phone Silvis (the Advocate-General) and the Supreme Court concluded that the defendant’s statement sufficiently supported the witness statement, Aben finds this evidence not to discriminate between the two scenarios; it offered no reason to attach more value to the witness than to the defendant. The Supreme Court’s general considerations provide a ground to conclude that it requires the second means of proof to fit the indictment scenario better than any opposing scenario. Its recent emphasis on the facts and circumstances of the witness statement not to stand on their own can be understood to mean that its orientation has shifted from a formal one – finding a second means of proof for the indictment – to a substantive one – finding a second means of proof that confirms a relevant part of the witness statement. Although this implies a more stringent rule, in practice the \textit{unus testis}, \textit{nullus testis} requirement is still not very hard to fulfil; giving particular reasons explaining why the second means of proof fits the indictment-scenario better do not seem to be required of the criminal courts. The Supreme Court does however now demand that the convicting court genuinely consider the issue of support in difficult cases.

Amidst many indications that the \textit{unus testis}, \textit{nullus testis} rule has become a more substantive requirement, there is the infamous case of the scooter theft, which can only be understood by the formal requirement of two means of proof for the (entire) indictment. Even apart from the obvious critique that the rationale of article 342(2) is completely ignored if, once the offence can be considered proven, anyone the witness (in this case the co-defendant) points out as the (co)perpetrator can be convicted, the consequence of this kind of decision is that flawed and incomplete police investigations are sanctioned in court.

\textbf{Testing unus testis nullus testis and the problem of guidance by the Supreme Court}

Our discussion of the case law since 2009 has shown that many uncertainties remain as to what the \textit{unus testis}, \textit{nullus testis rule} entails. Of course, it is impossible for the Supreme Court to fully answer this question in general. As to the first cases applying the new criterion, e.g. the “Gouda” case (2009) and the “Asylum seekers' centre” case (2010), the idea of clarification by case-to-case assessment

\footnote{D Aben concluding before Supreme Court 15 November 2011, ECLI:NL:PHR:2011:BQ8600, paras 5.9, 5.15.1-2, 5.15.5-7; Borgers (n 49).}

\footnote{Aben (n 70) at paras 5.17-18.}
seemed promising enough (although even then commentators urged the Supreme Court to further reason its decisions). The decision that the fact that someone was in town does not support the witness’s claim that that person threatened to kill her that day, can be understood especially compared to the decision that an arrest of the defendant near the scene of the alleged crime in possession of a knife shortly after the witness claimed to have been threatened by him with a knife, does provide the required support for the witness statement. Subsequent case law has however caused confusion instead of further clarification. Scholars and practitioners have particularly criticised this aspect of the case law, more fiercely now that several years have passed since the introduction of the sufficient support criterion in 2009. Commentators and Advocates-General have tried to deduce general rules from the case law, in vain, since rules deduced from one decision seemed not to apply in the next. The absence of reasoning by the Supreme Court thus became the focus point of criticism, evidenced by Reijntjes’ cry of the heart: “The Supreme Court finds developing the law to be one of its main tasks; then let it develop the law!” The Supreme Court’s “promise” of clarification on a case-to-case basis has proven hollow seeing that it does not even indicate in which of the available means of proof the required support can be found. Without any guidance by the Supreme Court, every conclusion about the application of the unus testis, nullus testis rule is to some extent speculative; this situation makes adherence to the requirement an extremely complicated matter for the criminal courts that may misinterpret the Supreme Court decisions.

In the 13 July 2010 case, the Supreme Court added to its general considerations about article 342(2) that in deciding on the fulfilment of the unus testis, nullus testis requirement, the provision of further reasons on this issue by the criminal court can be of importance. Even before, it was evident that additional reasoning is capable of preventing judgments being quashed for not adhering to the rule. Generally, courts are not required to provide any reasoning in evidentiary matters because their listing of the used evidence is considered to constitute the reasoning behind the evidentiary decision. In cases in which the support offered by the other evidence is not straightforward, however, the criminal court is required to state its reasons for finding sufficient support in other evidence. Providing further reasons, instead of merely listing the evidence in the judgment, provides insight into the criminal court’s assessment of the evidence, which then in turn can be assessed by the Supreme Court which would otherwise have to speculate on what relation the Court of Appeal has found the different means of evidence to have. For example, the fact that the Court of Appeal in the case of 4 January 2011 (threat by telephone) explained that it considered the defendant’s statement that he became angry during the phone call to be a confirmation of the witness’s statement on the contents of the conversation: a) clarifies that it did not consider the hearsay statement by T about what the witness had said about the conversation to be supporting evidence (which would be contrary to the Supreme Court’s case law) and b) enables the Supreme Court to judge whether the anger as confessed to by the defendant could indeed be regarded as sufficient support.

Also, the obligation to provide reasons furthers the goal of the rule to prevent miscarriages of justice, since it forces the criminal court to engage in an explicit and thus conscious evaluation of the meaning of the evidence in relation to the primary witness statement. Although it can be assumed

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72 In the 26 January 2010 (“Asylum Seekers’ Centre”) case the Supreme Court decided that the relation between the witness statement and the other evidence was clear with further reasoning; in the 29 June 2010 case (sexual assault in train) the Supreme Court found that, seeing the evidence listed in the judgment, the Court of Appeal had not been obliged to provide further reasons for its decision to find the defendant guilty.
that the criminal courts’ reasoning is taken into serious account by the Supreme Court, it remains unclear what the extent is of the Supreme Court’s test of the appealed judgment. If there is no additional reasoning, the Supreme Court clearly has to decide whether the listed evidence contains sufficient support without further explanation. We must assume that it still also takes the listed evidence into account, even though additional reasoning is provided that does not refer to this evidence. The decision to convict must be comprehensible, considering the totality of the listed evidence and the reasoning as to the evidence.\(^\text{73}\) As we cannot be sure in a specific case whether the Supreme Court fully endorses the reasoning of the Court of Appeal, or has taken into account other listed evidence in its decision that the requirement of article 342(2) has been fulfilled, the Court of Appeal’s additional reasoning does not improve the situation that in many cases it is practically impossible to find out what exactly the evidence is that the Supreme Court finds to be sufficient support. The speculation by Borgers as to the 5 October 2010 (catch pit) case that the evidence provided by the brother’s depositions (the girls’ faces showed disgust) may have been taken into account, although the Court of Appeal had only referred to the defendant’s statement (that he stood by and watched) as sufficient support, attests to this. In order to perform its task to safeguard the uniformity of legal interpretation, the Supreme Court is obliged to provide feedback on the criminal courts’ reasoning of their evidentiary decisions. There is no reason why this could or should not be done in the form practiced in other case law: if the Supreme Court approves of the decision but not of the reasoning, it upholds the decision while rephrasing the reasoning in terms of an explanation of “how this judgment is to be understood”.\(^\text{74}\)

**Obstacle to an “effective remedy” for victims?**

As has been recalled above, Dutch authors have always understood the potential of a strict interpretation of the *unus testis, nullus testis* rule to hamper the prosecution of sexual offences and hence the protection of victims of sexual offences by convicting the perpetrators. Although everyone writing about the rule favours a more stringent approach, there is consensus as to the fact that the rule should not become an obstacle to conviction in cases of sexual offences. In such cases, the requirements should still be applied but be interpreted more leniently, taking into account the fact that strong supporting evidence is just not available. As the case law and our conclusions above show, it is still not difficult to fulfil the requirements of the Dutch *unus testis, nullus testis* rule, which probably explains why no one really voices concerns about the issue of protection of victims. Neither has the rule – to our knowledge – ever been discussed in the context of possible violation of the ECHR’s effective remedy requirement (nor the requirement of positive obligations flowing from articles 3 and 8 of the Convention).

**Post-Salduz concerns?**

The implications of the ECtHR’s decision in *Salduz*\(^\text{75}\) have never been mentioned in the context of article 342(2), even though the *Salduz* case law is probably the most extensively discussed topic of criminal procedure in recent years in the Netherlands. The discussion has always also included the

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\(^{73}\) Reijntjes (n 53).

\(^{74}\) Borgers (n 49) at 893.

\(^{75}\) *Salduz v Turkey* (2009) 49 EHRR 19. See ch 2.4.
fear that suspects would be frequently advised to remain silent and confessions much harder to obtain, but this has never been related to * unus testis, nullus testis*. This, again, is not surprising considering that until 2009 the rule was hardly an obstacle to conviction on the basis of one witness statement. Assumedly, after the introduction of the stricter requirement the rule is still (considered) flexible enough to prevent concerns in this respect. Also, the case law discussed above shows that many defendants who deny the allegations do not remain silent.
INDEPENDENT LEGAL REPRESENTATION FOR COMPLAINERS IN SEXUAL OFFENCE TRIALS

RESEARCH REPORT for RAPE CRISIS SCOTLAND

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RESEARCH CONTEXT

Rape Crisis Scotland (RCS) is the national voluntary organisation which represents the rape crisis movement in Scotland. Part of the remit of RCS is to develop legal strategies to improve justice responses to sexual offences. As part of a wider consideration of possible improvements to the Scottish legal system’s response to rape and sexual offences, RCS is therefore interested in exploring the concept of independent legal representation, with a view to considering whether or not this would have a positive impact on women’s experience of the legal system.

RCS commissioned this research against a backdrop where there have been long standing concerns about the response of the Scottish legal system to complainers of sexual offences. Women in contact with rape crisis centres do not speak highly of their experience of the justice process. Particular difficulties arise in relation to their status as a witness of the crime perpetrated against them, and the role of the Crown Office in acting in the public interest: women consistently tell rape crisis that they feel throughout the process that there is no one representing their interests.

This report considers the features of Scottish criminal procedure and evidence that exacerbate the problems currently facing complainers and that shape the response the criminal justice system can currently make. It explores how independent legal representation operates in other jurisdictions and considers the feasibility of its introduction in Scotland.
ACKNOWLEDGEMENTS

I would like to thank all those academics, legal practitioners, campaigners and policy-makers from numerous jurisdictions who gave generously of their time and ideas by communicating with me in person, by email and telephone in connection with this Report. Their willingness to share their experience and reflections has greatly enriched this Report and my own understanding. I am, of course, wholly responsible for any misinterpretation of their ideas and other errors that appear here.

In particular, I would like to thank Betty Bott, Susan Boyd, Christine Boyle, Lydia Fiorini, Lise Gotell, Roseangela Gramoni, Conor Hanly, Ernestine Kohne-Hoegen, Andrew McIntyre, Kate Mulkerrins, Dee Smythe and Larry Wilson.

I also wish to acknowledge the research assistance I received from Nicola Guild who prepared datasets, found materials and tracked down references with great efficiency and cheerfulness.

Finally, a special thanks to my colleague Pamela Ferguson for commenting on earlier drafts, posing challenging questions and providing such reliable intellectual support, and to Sandy Brindley of Rape Crisis Scotland who had the original idea for this research and whose endless patience and good humour until its appearance made the process so straightforward.

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May 2010
CHAPTER ONE

BACKGROUND TO THE RESEARCH

INTRODUCTION

1.01 The prosecution of sexual offences is a cause of common concern across all English speaking countries and much of Europe. Conviction rates for rape are notoriously low in comparison with conviction rates for crime generally, and by the same token, attrition rates are correspondingly high.1 According to a study published in 2003, Scotland’s statistics compare unfavourably with those for England and Wales and with those of 28 other European countries, comprising the EU member states, aspirant states, and Switzerland and Norway.2 At that date, only the Republic of Ireland had a lower conviction rate than Scotland. The Scottish Government’s rape statistics show that in the year 2007-2008 the conviction rate as a proportion of all rapes reported to the police was 3.7%. As a proportion of all rape charges indicted for prosecution the conviction rate increases to 31%. The overall conviction rate for crimes that proceeded to trial in Scotland in 2007 was 89%.3

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1.02 Obviously one must treat such statistical comparisons with care, as each country tends to adopt different rules for defining rape as well as different methods for measuring how the crime is reported, recorded and prosecuted. However, Scotland must also confront the fact that conviction rates have been declining during a 15 year period when the rates of reporting, recording and prosecuting have significantly increased.4

1.03 The Scottish government has introduced various victim-orientated policies to improve the experiences of complainers.5 Towards a Just Conclusion in 19966 centred on supporting vulnerable and intimidated witnesses to enable them to give their best evidence. Redressing the Balance in 20007 focussed on the evidential and procedural rules in sexual offence cases. Both fed into the Scottish Strategy for Victims published in 2001.8 The main legislation enacted has been the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 (SOPESA) and the Vulnerable Witnesses (Scotland) Act 2004 (VWSA).

1.04 However, this new legislation has not achieved all it set out to do. The Scottish Government evaluation of SOPESA published in 2007 indicates that restrictions in the use of sexual history and other character evidence have not materialised as anticipated.9 The VWSA was not fully phased in until April 2008, and an evaluation of that published in July 2008 concluded that many aspects of its implementation remain incomplete, largely due to a lack of resources to support the necessary infrastructure for an effective nationwide witness support system.10

1.05 Despite the reform agenda, it is difficult to know to what extent, if at all, complainers feel better off. In part, this is because both these evaluations of recent legislation had to rely

4 n. 2.
5 All other English-speaking jurisdictions refer to the victim witness as the complainant.
6 http://www.scotland.gov.uk/library/documents-w3/tajc-00.htm
7 http://www.scotland.gov.uk/consultations/justice/rtb-00.asp
8 http://www.scotland.gov.uk/Publications/2001/01/7963/File-1
on relatively small numbers of interviewees – not uncommon in this type of victim research. As Richards et al. noted, one of Scotland’s long-standing deficiencies in criminal justice is the relative dearth of published empirical data, especially qualitative data, from which to assess the impact of reforms on victims, witnesses and complainers.\(^{11}\) Certainly, it is difficult to discern any positive impact from this legislative activity on rape conviction rates, given that the latter have progressively deteriorated since the 1970s.\(^{12}\) However, while outcomes such as conviction rates or attrition rates are very important indicators, they are quantitative measures and are only one dimension of the overall picture. An equally critical measure is the difference in how complainers now experience the criminal justice response to rape both at the pre-trial stage of the investigation, and in the courtroom.

1.06 Despite a lack of qualitative data collected officially by government we do have data gathered by those in the frontline support services, such as Rape Crisis Scotland, Victim Support and Scottish Women’s Aid. That data, together with media reports and case law,\(^{13}\) suggest the experience for complainers in sexual offence trials has not dramatically altered in recent years.\(^{14}\) Those who report rape and other sexual offences are often highly critical of their treatment within the legal process, recounting experiences that veer from unpleasant and uncomfortable to degrading and humiliating.\(^{15}\) Over the years these criticisms have been meticulously documented by researchers and relate to all stages from the point of reporting to the trial.\(^{16}\) They include the attitude and inconsistency of response by the police, the unpleasantness of the medical examination procedures, the failure to search effectively for, or to preserve, evidence, the indignity of giving evidence about personal and intimate matters, and fear of the cross-examination techniques of defence counsel. In particular, many women who allege rape claim they still face a culture of disbelief from the police and feel they are

\(^{11}\) n. 11 at para 4.11.

\(^{12}\) n. 2 and the Scottish Bulletin Criminal Justice Series generally.

\(^{13}\) For example, Cumming v HM Advocate 2003 S.C.C.R. 261 and Kinnin v HM Advocate 2003 S.C.C.R. 295.


\(^{15}\) Kelly et al., n. 1.

not taken seriously at many subsequent stages of an investigation and prosecution, culminating in what is often described as a shocking and humiliating experience during cross-examination in the witness box.\textsuperscript{17}

1.07 Despite many attempts to address these issues through statutory reform, policy guidelines, and public education campaigns that aim to put victims at the heart of the criminal justice system, there remains a startling “disconnect” between the ambitions of legislators and policy makers and the reality of a sexual assault trial from the perspective of complainers. The negative impact of this disconnect is not just on the individual victims involved and their families, but on the confidence of the public at large.\textsuperscript{18} If those who complain of sexual offences, and those offering support to such complainers, lack confidence that they will receive fair treatment or that the criminal justice system will deliver justice, then the authority of the legal system is undermined. The Justice Secretary Kenny MacAskill recognised this in a speech in December 2007 following the publication of the Scottish Law Commission’s \textit{Report on Rape and Other Sexual Offences}\textsuperscript{19}:

There has been considerable public, professional and academic concern that the current law on rape is unsatisfactory, unclear, and too narrowly drawn. Equally, many other aspects of Scots law on sexual offences need modernising and require reform. Much of the current legislation derives from a time when attitudes were very different from those of contemporary society and is no longer fit for purpose. Scotland needs a robust, modern framework of laws in this area, fit for the 21st century – a clear legal framework that ensures rapists and sex offenders are brought to justice and that victims have confidence in the Justice system.\textsuperscript{20}

1.08 According to Rape Crisis Scotland, particular difficulties arise for complainers in relation to their status as a witness of the crime perpetrated against them, and the fact that

\footnotesize\textsuperscript{17}n.17.


\footnotesize\textsuperscript{19}Scot Law Com 209 (2007).

\footnotesize\textsuperscript{20}See \url{http://www.scotland.gov.uk/News/Releases/2007/12/18110613}
their interests are only one of several which the Crown has to consider whilst acting in the public interest. Women consistently report that they feel throughout the process as if there is no one representing their interests. The need for “a robust, modern framework of laws in this area, fit for the 21st century” prompted Rape Crisis Scotland to commission this research to explore whether or not the introduction of some form of independent legal representation, a routine entitlement for victims in Europe, could have a positive impact on the experiences of complainers in Scotland.

AIM AND OBJECTIVES OF THE RESEARCH

1.09 The primary aim of this project is to explore the feasibility, benefits and any disadvantages of introducing independent legal representation for complainers in sexual offence trials in Scotland. In furtherance of this aim, the principal objectives are:

i. To provide information about the extent and types of independent legal representation in other English speaking jurisdictions and elsewhere in Europe

ii. To consider any benefits and disadvantages experienced in other jurisdictions through the use of forms of independent legal representation

iii. To consider how independent legal representation fits within an adversarial legal system

iv. To consider whether such representation could be introduced in Scotland.

1.10 The following six chapters of this Report address these objectives as follows:

Chapter 2 outlines the international and European legal framework for complainant participation in the investigation and prosecution of sexual offences. It then briefly explains how Scots law responds to this framework and how this impacts on complainers. Chapter 3 details Independent Legal Representation (ILR) elsewhere in Europe. Chapter 4 explores how other countries which rely heavily on the common law provide for victims of rape. It considers the problems stemming from an absence of ILR and the arguments put forward by those who defend the adequacy of the present system. Chapter 5 then considers the status of the complainer in Scots law and the conflicts facing prosecutors in seeking to take account of the tripartite interests of complainer, accused and the public both in the decision to prosecute and in subsequent proceedings. Chapter 6 explores the potential benefits of ILR from the
perspective of the complainer and the different stages in the process at which these benefits might arise. Chapter 7 explores the case for introducing ILR into Scots law, as well as the objections which could be raised against such a reform. Chapter 8 concludes the Report.

TERMINOLOGY

1.11 Until July 2009, with the enactment of the Sexual Offences (Scotland) Act the law of rape in Scotland had been classified as a common law offence. The definition of rape is now contained in section 1 which provides:

(1) If a person (“A”), with A’s penis—
(a) without another person (“B”) consenting, and
(b) without any reasonable belief that B consents, penetrates to any extent, either intending to do so or reckless as to whether there is penetration, the vagina, anus or mouth of B then A commits an offence, to be known as the offence of rape.

This statutory definition adopts the recommendation of the Scottish Law Commission that rape law should be gender neutral as far as the victim is concerned though the perpetrator remains gendered as only men can commit rape. Section 9 defines consent as “free agreement” and s. 10 describes some of the circumstances when free agreement is deemed to be absent.

The issue of consent is of course one of the most contentious aspects of rape and the Act embraces the principle set out in the important decision in the Lord Advocate’s Reference No.1 of 2001, which held that the crime of rape consisted of sexual intercourse with a woman without her consent. Prior to the Reference, the crime of rape consisted of sexual intercourse in circumstances where a woman’s will had been overcome. Notwithstanding the introduction of a statutory definition, the historic interpretations of consent contained in the case law will likely continue to be significant as how the Crown proves lack of consent

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21 Though it is thought women could be guilty of rape on an art and part basis.
remains a matter for the law of evidence, and will not cease to be problematic. Proof of consent lies at the heart of rape trials, and the evidential and procedural manner in which that proof is established and contested is the single greatest contributor to the distress caused to complainers.

1.12 Serious sexual offences involving penile penetration can of course be committed against men and children and until the 2009 Act these were characterised either as the common law offences of sodomy, indecent assault, or lewd or libidinous behaviour, or as statutory offences. Part 4 of the Act now classifies all such sexual offences against children, together with numerous others, as statutory offences.

1.13 The terms of reference for this Report focus on the complainer, the Scots law term for the victim witness. All other English-speaking jurisdictions refer to the victim as the complainant. For jurisdictional consistency, the terms complainer and complainant are both used throughout this Report according to the country under discussion. Technically, “complainer” is only appropriate once an official complaint has been made. Thus the term would not include, for example, those who choose not to make a report to the police but instead seek help from a rape crisis centre or sexual assault referral centre or similar. Nor would it include those who report a rape but who later withdraw it because they do not feel able to go through with it. Sometimes the term “victim” is used for consistency of meaning when comparisons are being made with other jurisdictions. Although “survivor” may be the preferred term, most of the literature and legal instruments refer to victim.

1.14 The Report was commissioned to explore the use of Independent Legal Representation in sexual offence trials generally but, inevitably, rape has become its focus. Rape is the most serious sexual crime under the law and the rape trial is the paradigm of the troubling and discriminatory nature of all sexual offence prosecutions. The focus on rape is not in any sense to diminish the experiences of survivors of other sexual assaults who may be affected just as deeply, physically, sexually and emotionally, as those who are raped. Sex crimes affect individuals in different ways, the circumstances of the crime vary, as do the levels of

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24 See, for example, McKearney v HM Advocate, 2004 J.C. 87.

25 See ss. 14-29 in Part 4. Part 5 of the Act also concerns separate offences against children committed as an abuse of a position of trust.
resilience available to each survivor.\textsuperscript{26} However, as the Crown Office Review in 2006 noted, “the investigation of sexual offences against men raises some quite separate issues from those in respect of offences against women, and further, where the victim is a child some of the issues are different again”.\textsuperscript{27} This report does not consider these separate and different issues.

METHODOLOGY

1.16 The research was largely library-based using primary and secondary sources including legislation, law reports, and empirical studies from a wide range of jurisdictions. This research was supplemented by face to face, email, and telephone discussions with academics, practitioners and activists, several of whom work in jurisdictions where some form of independent legal representation is available to complainers.


INTRODUCTION

2.01 In recent years there has been growing international recognition of the rights of victims to play a part in the justice process, to be consulted about the impact of the crime they have suffered, and to have access to civil remedies and compensation. Legal recognition for these rights rests more in “soft” law as the framework tends to be statements of intent and aspiration rather than binding treaties or legal instruments. Recognition within human rights law is tenuous but there is a growing number of explicit protective provisions. However, certain emerging principles can be detected in the case law.

INTERNATIONAL AND EUROPEAN FRAMEWORK

2.02 The General Assembly of the United Nations adopted the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power on 29 November 1985. In the same year the Council of Europe passed Recommendation No. R (85)11 on The Position of the Victim in the Framework of Criminal Law and Procedure. In light of these position statements most European countries have revised their legislative framework for the treatment of victims and Scotland is no exception.

2.03 The Scottish response to Recommendation (85)11, in common with most jurisdictions, has concentrated on support measures for child witnesses who represent the paradigm vulnerable witness. However, the response has been set within a broader context that recognises that the justice system can only function effectively if witnesses are treated with

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dignity and respect. The *Vital Voices* policy statement\(^{30}\) articulated the Scottish Executive’s proposals for improvements to the treatment of witnesses and complainers and the subsequent Vulnerable Witnesses (Scotland) Act 2004 was designed to ensure compliance with Recommendation (85)11.

THE EUROPEAN CONVENTION ON HUMAN RIGHTS

2.04 The European Convention on Human Rights and Fundamental Freedoms (ECHR) has several specific provisions of value to victims of crime and to witnesses and complainers.\(^{31}\) In particular, arts 3, 8 and 13 can be construed in ways that support the interests of witnesses. Article 3 of the ECHR states: “No one shall be subjected to torture or to inhuman or degrading treatment”. Article 8 states: “Everyone has the right to respect for his private and family life, his home and his correspondence.” Article 13 states: “Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.” Each of these articles is capable of an interpretation that protects witnesses, for example, in rape and sexual assault cases where complainers often characterise cross-examination as “degrading”.\(^{32}\)

2.05 Traditionally, nation states have treated the interests of witnesses, whether as victims or complainants, as subordinate to the rights of an accused. Thus, article 6, the right to a fair trial is the right of an accused to receive a fair trial, not the right of a victim to feel there has been a fair trial. Although the ECHR does not specifically constitute the welfare of a victim in terms of a formal “right”, as already noted their interests are recognised in several articles. Moreover, a growing body of academic opinion argues that the ECHR does place positive obligations on the State to protect victims, in effect acknowledging that victims *do* have


This argument is supported by Strasbourg case law. For example, in *MC v Bulgaria* the European Court of Human Rights held that Bulgaria had a duty to the applicant to ensure that their rape law did not require her to demonstrate that she had physically resisted a rape, and held that the evidence of her non-consent ought to be sufficient for proof of the offence. The Court noted that “under Articles 3 and 8 of the Convention, Member States had a positive obligation “to enact criminal law provisions to effectively punish rape and to apply them in practice through effective investigation and prosecution.”

To the extent that Bulgarian rape law required a complainant to show that physical force was used against her and that she had actively resisted the rape, the Court ruled that there were breaches of MC’s rights under arts 3 and 8.

**NATIONAL FRAMEWORK FOR COMPLAINERS’ RIGHTS**

2.06 The Human Rights Act 1998 incorporated the ECHR into Scots law and this Act applied in Scotland from the point of devolution under the Scotland Act 1998. At a stroke, Scots law had to be ECHR compliant. In criminal matters, appeals citing a breach of Convention rights are heard beyond Scotland by the Judicial Committee of the Privy Council. What impact has this international and European framework had in relation to the investigation and prosecution of sexual offences? How, if at all, has it impacted on the legal status of the complainer in Scotland?

**THE STATUS OF THE COMPLAINER**

2.07 Scots law has an adversarial (also described as accusatorial) system of law, with two parties in opposition to each other and the judge occupying the role of adjudicator. It is a

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35 n. 35 at para 153.
general characteristic of adversarial systems that victims and witnesses have no standing in the process and no right to legal advice or representation during the trial. In Scots law the complainer in rape and sexual offences is a witness like any other and as such has no special status in the trial process. The exclusion of victims from meaningful participation in pre-trial and trial proceedings is not peculiar to Scotland, but Scots complainers fare less well than their counterparts in some other adversarial systems. For example, states in the US as well as Canada and the Republic of Ireland have introduced limited measures to support complainers largely through constitutional recognition of rights for the victims of crime.\textsuperscript{36}

2.08 In those European countries where the legal system is predominantly inquisitorial, with proceedings more directly controlled by a judge, virtually every country permits some form of independent legal representation for victims of sexual offences. There is no single definition of independent legal representation, and in some countries complainers can access a comprehensive service from the point of reporting at the police station through to representation in the courtroom and at an appeal. Even those countries with a more selective range of services generally permit the complainant some level of representation in court. The next chapter considers the different schemes that exist to advise, support, and represent complainers.

\textsuperscript{36} Discussed in later chapters.
CHAPTER THREE

INDEPENDENT LEGAL REPRESENTATION IN CONTINENTAL EUROPE

INTRODUCTION

3.01 As detailed in the previous chapter, the recognition of victims’ rights is a growing international trend, as are policies to increase victim participation in the criminal justice process. Many jurisdictions have accepted that meaningful victim participation entitles a complainant to some form of independent legal representation (ILR).

3.02 It is not the purpose of this Report to provide a detailed account of how each ILR scheme operates in other jurisdictions. Detailed accounts are already available. Two of the most valuable and comprehensive reports were published in 1998 and 2000 respectively, in the wake of Recommendation No. R (85) 11 on the position of the victim in the framework of criminal law and procedure in the EU and each provides systematic evaluations of progress towards its implementation.

3.03 Firstly, *The Legal Process and Victims of Rape*, authored by Bacik, Maunsell and Gogan (from here on “the Irish study”) was an EU funded research study of 15 European countries conducted by the Faculty of Law, Trinity College Dublin and the Dublin Rape Crisis Centre. It is a wide-ranging comparative analysis of the legal procedures relating to rape in the (then) 15 member states of the EU. Five of these states were in depth participants: Belgium, Denmark, France, Germany and the Republic of Ireland. Nine of the ten states responded to a questionnaire: Austria, England, Finland, Greece, Italy, Luxembourg, the Netherlands, Portugal, Spain and Sweden. With the exception of England and Wales and the Republic of Ireland, every country gave complainants some form of entitlement to legal representation.


38 Scotland was not part of the study, not being a country with member status.

39 Although one participant, Greece, failed to return the questionnaire in time.

40 Bacik et al., n. 38 at p.17.
3.04 The Irish study found compelling evidence of the potential benefits of ILR. Their interviews with women who had received legal representation was that all felt more confident in giving evidence and less hostile towards defence counsel. Overall, the isolation felt by most rape complainants and the difficulties they encounter in accessing information about their case or making their views known in regard to decisions affecting the conduct of the investigation and prosecution were alleviated by having their own legal representation. The researchers’ conclusions are repeated in full here:

A highly significant relationship was found to exist between having a lawyer, and overall satisfaction with the trial process. The presence of a victim’s lawyer also had a highly significant effect on victims’ level of confidence when giving evidence, and meant that the hostility rating for the defence lawyer was much lower. Participants also found it easier to obtain information on the investigation and trial process when they had a lawyer, but were less satisfied with the state prosecutor, perhaps because they had higher expectations of the prosecutor as a result of their positive experience with their own lawyer. Overall, the impact of the legal process on the family of the victim was also lessened where the victim was legally represented. Where participants had a victim’s lawyer, their lawyer was the main source of information concerning bail, trial process etc. Some problems were experienced in relation to state-funding of lawyers, since in some countries the qualification threshold for the means test is very high. Finally, the victim’s lawyer was the legal officer with the highest satisfaction rating among the sample...  

3.05 The second wide-ranging study in 2000 was carried out by Brienen and Hoegen who prepared a progress report on the responses to Recommendation (85) 11 from twenty-two different jurisdictions within Europe. In addition to these two reports, UK researchers,

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41 Bacik et al., n. 38 at pp.17-18.
Regan and Kelly, have prepared recent empirical studies for Rape Crisis Network Europe. Rather than replicate or summarise any of this material, this Report seeks to give a broad overview of available forms of legal representation.

THE CIVIL TRADITION AND THE ADVERSARIAL TRADITION

3.06 In the field of criminal justice, comparisons between the three common law jurisdictions of the UK with mainland European countries with a civil tradition are often dismissed as inappropriate and unhelpful as one is not comparing like with like. In particular, some argue the predominantly inquisitorial procedure of most European countries does not permit ready comparison with adversarial systems such as those in Scotland, England and Wales or Northern Ireland. However, there has not yet been a persuasive articulation why lessons from the Continental experience should not prove valuable in seeking remedies to the similar types of problem that face complainants of rape in other countries. A substantial body of academic opinion claims the divisions between adversarial and inquisitorial systems are exaggerated and artificial. Close inspection suggests that most legal systems have a mixed heritage with features of each system identifiable within the other.

3.07 Generalised dismissals of inquisitorial models of criminal justice as incomparable with accusatorial ones deserve more probing for several reasons. First, as Summers argues, there is ample evidence that all judicial proceedings governed by article 6 of the ECHR are adversarial in nature. The Nordic countries of Denmark, Iceland, Norway and Sweden illustrate this argument as all adopt elements of adversarialism within their criminal system.


43 n. 2.


47 Summers, n. 45 especially pp. 103-128.
procedure. Thus the comparison is not necessarily between intrinsically polarised approaches.\textsuperscript{48} In Denmark the scheme of legal representation has been so successful it has been extended to other victims of violent, but non-sexual, crimes.\textsuperscript{49}

3.08 Second, increasingly, EU countries are seeking approximation (sometimes referred as harmonisation) of laws to secure closer pan-European co-operation in various criminal procedures under the policy of mutual recognition. For example, there is a significant degree of approximation through the European arrest warrant and through moves to share evidence to achieve effective cross-border responses to organised crime. Steps towards this invariably require some degree of “smoothing over” of differences in procedures.\textsuperscript{50} In practice accommodations are made, and the notion that legal systems are either purely accusatorial or inquisitorial is no longer tenable.

3.09 Third, if one takes a wider comparative lens and reflects upon the underpinning values of a European community, all of whose members subscribe to the values contained in the ECHR, one could argue that there is far more that unites than divides countries in their implementation of Recommendation (85)\textsuperscript{11}. As Pizzi has claimed, scrutiny of the adversarial system “reveals no metaphysical constraint that demonstrates that criminal cases have two, and only two, sides.”\textsuperscript{51}

3.10 This is also true of Scots law. Rights to appear before the Scottish courts have evolved over the centuries. Until the Criminal Evidence Act 1898 accused persons did not even have a right to give evidence on their own behalf. Today the rights of the accused permit them to choose whether to give evidence and, subject to certain constraints, to choose who will represent them or whether they will represent themselves. Rights of audience have therefore historically been fluid and responsive to changing social circumstances.

\textsuperscript{49} Temkin, n. 17. Temkin’s book discusses the Danish scheme at length in Chap 5.
\textsuperscript{51} W. Pizzi, n. 47 at p. 350.
MAIN FEATURES OF ILR IN OTHER EUROPEAN JURISDICTIONS

3.11 There are wide variations and nuances of difference across the European schemes. Rarely do two jurisdictions mean precisely the same when they refer to a “right” of a victim to be represented in court. The entitlement to ILR does therefore need to be understood in its jurisdictional context as often the entitlements afforded to complainants reflect procedural rights specific to a particular state, as in the *partie civile* status in Belgium and France. One must therefore be careful before making comparisons or generalisations. Instead the aim here is to describe the various schemes in sufficient detail to permit an appreciation of whether they could be imported into Scots law.

3.12 In broad terms, there are five distinct stages where ILR may be available:

i. At the report stage
ii. Post-report at the investigation stage
iii. Post-decision to prosecute when pre-trial support and advice is offered
iv. Representation during trial
v. Post-trial representation

TYPICAL FEATURES OF ILR SCHEMES

3.13 At the report stage most countries have schemes that permit victims to get advice and support from a lawyer, and to be accompanied by a lawyer at the police station. These countries include Belgium, Spain, the Netherlands, Luxembourg, Finland and Austria. Other countries, including England and Wales and Scotland, might well permit a lawyer to accompany a victim to the police station to report a crime, but the lawyer’s role would be no more than that of a lay observer. Where legal representation is permitted, not every state funds it. Those that do, include Denmark, Finland, Luxembourg, the Netherlands and Spain. Denmark not only provides state-funded legal advice, it imposes a duty upon the police to inform the woman of her right to such advice. In contrast, some countries such as France and the Republic of Ireland fund the advice but, perversely, impose no duty on the police to explain its availability.
3.14 Once a complaint has been made many schemes envisage the lawyer acting as a liaison between the authorities and the complainant. This generally involves keeping her informed about key stages in the investigation and prosecution, as well as ensuring her views are represented in critical decisions concerning, for example, whether to plea bargain and which witnesses to contact. Even the provision of information and legal advice has a positive effect, as it is widely accepted that the more control one can exert over the processes that are impacting deeply on one’s life the more one can reduce stress levels. The most common types of ILR are now described.

3.15 The *partie civile* procedure in **Belgium and France** gives the complainant a very strong platform for participation in the trial from the stage of reporting onwards. In particular, it gives her lawyer the right of access to the *dossier* of evidence at the end of the pre-trial investigation, and also the right to be present in court throughout the trial, to speak on the [*rape*] victim’s behalf in court, to call witnesses on behalf of the victim (subject to the judge’s discretion); to object to questions put to the victim by the defence or prosecutor; to cross-examine the defendant; to make submissions to the court on the law, and to address the court… as to compensation.

3.16 Although **Denmark** was the first county to introduce ILR, their scheme does not supply as extensive a set of rights as that which operates in Belgium and France. The Danish complainant is entitled to legal advice at the report stage, access to the dossier once a prosecution has been instigated, and representation in court during her examination-in-chief and cross-examination. Danish legal representatives cannot call witnesses, but they can ask for protective measures for their client such as a screen to shield them from the accused.

3.17 In **Germany** the *nebenkläger* status for victims gives the victim’s lawyer the role of a secondary prosecutor. The lawyer has access to all the papers which means that “the victim’s lawyer generally has the same rights of participation at the trial as the prosecutor and defence

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53 The term used in the Continental inquisitorial process to describe the file of evidence comprising police statements and prosecution papers.

54 Bacik et. al., n. 38, p. 182 at paras 4.1-4.3 (Belgium) and p. 218 at paras 4.1-4. (France).

55 Bacik et al., n. 38, pp. 198-200 at paras 4.1-4.3.
lawyer”, including asking questions of the accused and seeking to rebuff hostile questions towards their client.

3.18 The Republic of Ireland permits ILR at the report stage and has only recently introduced limited rights to legal representation if an application is made by the defence to introduce sexual history evidence. However, if the judge grants the application the complainant’s lawyer has no further role.

3.19 All of the nine European member state respondents to the questionnaire in the Irish study, with the sole exception of England and Wales, permitted some form of legal representation for rape victims during the trial. Explaining that “the rights of the victim’s lawyer differ somewhat between jurisdictions”, the researchers listed the most significant rights offered by countries:

[I]n six jurisdictions (Finland, Italy, Luxembourg, Portugal, Spain and Sweden), the victim’s lawyer possesses extensive rights of participation at trial, in many respects similar to the prosecution and defence counsel. In Portugal, the victim’s lawyer can even appeal an acquittal or a lenient sentence.

The victim’s lawyer may therefore exercise some or all of the following rights:

- the right of access to the evidence before the trial (including the right to inspect the prosecution files)
- the right to be present in court throughout the trial
- the right to speak on the victim’s behalf in court
- the right to object to questions put to the victim by the defence or prosecution
- the right to cross-examine the defendant
- the right to make submissions on the law

56 Bacik et al., n. 38, p. 237 at para 4.4.
57 Bacik et al., n. 38, pp. 237-238 at paras 4.1-4.4. For an American perspective of the German scheme see Pizzi, n. 46.
58 Section 34 of the Sex Offences Act 2001 permits a woman to have her own legal representation to oppose an application to introduce sexual history evidence. Such an application can be made pre-trial or during the trial.
59 Bacik et al., n. 38 derived from chapters 6, paras 7-10 and chapter 11, paras 4.1-4.3.
60 Bacik et al., n. 38 at para 4.4, pp. 288-289.
- the right to suggest that certain witnesses are called on behalf of the victim
- the right to address the court as to the guilt or innocence of the defendant
- the right to address the court as to compensation for the victim
- the right to address the court as to sentence

The victim’s lawyer has less extensive rights of participation in the Austrian and Dutch legal systems, and may only address the court on the victim’s behalf in relation to compensation.
CHAPTER 4

INDEPENDENT LEGAL REPRESENTATION IN COMMON LAW JURISDICTIONS

INTRODUCTION

4.01 This section looks at practices and reforms in a number of common law jurisdictions to see what their experiences suggest for Scotland. The enquiry centres on practices in the English-speaking jurisdictions of Australia, Canada, England and Wales, New Zealand, the Republic of Ireland, South Africa, and the USA.

4.02 All of these common law jurisdictions have engaged in public debate over the scope of victims’ participatory rights. For example, in Australia\(^\text{61}\) at state level and the US\(^\text{62}\) at federal level, the norm for victims is an entitlement to information, support, compensation, and the right to make a victim impact statement. However, these entitlements are usually provided through the prosecutor’s office and do not extend to the provision of the services of a legal adviser. The Republic of Ireland Law Reform Commission\(^\text{63}\) and the South African Law Reform Commission have each issued reports that addressed, but rejected, the option of ILR.\(^\text{64}\) In England and Wales, ILR surfaced as a pre-election commitment in the Labour Party manifesto prior to the 2005 general election, but has never been considered in any

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\(^\text{61}\) See e.g. the Victims of Crime Act 2001 for the state of South Australia: [http://www.dpp.sa.gov.au/02/VICTIMSACT.pdf](http://www.dpp.sa.gov.au/02/VICTIMSACT.pdf)


detail. Canadian activists commissioned a model ILR scheme for their country in 2005 and campaign for its implementation.\textsuperscript{65}

NORTH AMERICA
4.03 The US and Canada adhere very closely to the principle of due process which emphasises the pursuit of procedural rules to achieve substantive justice.\textsuperscript{66} As adversarial jurisdictions they have the rights of the defendant at the heart of their constitutions and the rights of the victim are far less visible or easy to enforce.\textsuperscript{67} Both the US Constitution and the Canadian Charter of Rights and Freedoms provide entrenched constitutional rights to citizens, though these do not go as far as grant a general right to ILR. Both jurisdictions have focused on developing integrated support agencies (health, legal, counselling etc) many of which have staff who act as legal advocates in dealing with the police and prosecution authorities.\textsuperscript{68}

THE USA
4.04 The powerful victims’ rights lobby in the US has made considerable headway in carving out a set of entitlements for those affected by crime, especially through the federal Crime Victims Rights Act 2004.\textsuperscript{69} Most states in the US have enacted victims’ rights legislation and the campaign for a federal Victims Rights Amendment to the Constitution is long-established.\textsuperscript{70} These rights are largely confined to pre-trial procedural rights such as the right to be kept informed of progress of the investigation, to be advised of plea negotiations, to be protected from intimidation etc.; and at the trial stage to give a victim impact statement before sentence. The appointment of specialist prosecutors for rape and domestic assault,

\textsuperscript{65} The model was commissioned by the Sexual Assault Crisis Centre Windsor, Ontario, from Professor Larry Wilson of the University of Windsor. See L. Wilson (2005) ‘Independent Legal Representation for Victims of Sexual Assault: A Model for Delivery of Legal Services’, Windsor Yearbook of Access to Justice, 23: 249-312.
\textsuperscript{68} The Barbra Schlifer Clinic in Toronto is an exemplar of what can be offered. It is widely regarded as one of the leading advocacy centres in Canada. See: http://www.schliferclinic.com/schliferClinic.html
\textsuperscript{69} See http://www.usdoj.gov/usao/eousa/vr/cvra/18_USC_3771.html
\textsuperscript{70} See website of National Victims’ Constitutional Amendment Passage http://www.nvcap.org and for debates, see Special Issue on Law Reform, Utah Law Review, 1999, whole volume.
coupled with a strategic focus on case-building techniques, have had significant success in improving conviction rates and complainant satisfaction. Victim familiarisation programmes give the complainant insight into the cross-examination process and facilitate techniques to enable her to give her best evidence.

4.05 The purpose of case-building is to counteract the tendency to blame the complainant when discrepancies and divergences arise in her testimony. Prosecutors are encouraged to adopt a more pro-active approach to overcome the perceived “credibility gap” between the statements the complainant has given to the police and the testimony ultimately given in court. The emphasis is on seeking corroboration to strengthen the case rather than concede its apparent weaknesses. Otherwise the complainant becomes an easy target for defence counsel’s suggestions that she has exaggerated, is unreliable, or at worst made a false complaint. In the US “prosecutors are encouraged to adhere to a three-pronged strategy which aims to (a) elicit a complete account from the complainant; (b) address behaviour that may appear counter-intuitive to jurors; and (c) prepare complainants for the unfamiliar process of testifying in court.”

4.06 The case-building approach used in New York – known as the Manhattan model – was considered as a model for Scotland by the authors of the 2006 Review of the Investigation and Prosecution of Sexual Offences in Scotland, (Crown Office Review) where they acknowledged the potential benefits to the complainant as:

- Establishing a relationship/rapport with the prosecutor/ prosecution staff
- Discussion of appropriate support mechanisms at court and determination of their suitability

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71 There is a National Programme to develop Sexual Assault Response Teams (SARTS) to ensure the collection and preservation of evidence at the earliest opportunity. See the work of the National Sexual Violence Resource Center at [http://nsvrc.org/](http://nsvrc.org/).


73 Crown Office Review, n. 28.

74 Crown Office Review, n. 28 at para10.11.
° Familiarity with the court environment
° Knowledge of and confidence in the investigation process
° An understanding of the demeanour and personality of the prosecutor
° An understanding of the trial process and cross examination, including likely areas of contention/disputed facts
° An opportunity to feedback/discuss the impact and existence of any collateral evidence

Nonetheless, the Crown Office Review ultimately rejected the Manhattan model due to concerns that its introduction in Scotland would come “perilously close to coaching the witness”. This point is discussed in the next chapter.

CANADA
4.07 Although in Canada “there is no general right of participation for any third party”, there is “limited opportunity for participation by victims of sexual assault”. While Canadian commentators may perceive their practices as “limited”, they are markedly more advanced than in Scotland. For example, there is a well-developed body of Canadian case law recognising the status of the victim of crime and granting her specific rights of representation in regard to any steps which jeopardise her constitutional equality and privacy rights.

4.08 As part of the protection of the Canadian complainant’s equality and privacy rights she has legal and constitutional standing to oppose applications for recovery of her personal records. Typically, this occurs when the defence apply for recovery of medical or counselling records, or any other private papers such as diaries. The prosecution authorities in both Canada (and the US) have similar extensive duties of disclosure to those in Scotland, but unlike Scotland, they have also developed a transparent regime to take account of the complainant’s constitutional rights.

4.09 However, it would be a mistake to see the solution to the absence of proper protection for complainers lying entirely in a strengthened or more transparent rights framework.

75 Crown Office Review, n. 28 at para 10.2.
76 Wilson, n. 66 at p. 262.
Quite apart from the difficulties of access to these rights by less wealthy or privileged victims, the interpretation of rights rests with the judiciary who are at pains to emphasise the delicate line they tread in balancing interests.78 Recent research with the English judiciary conducted by Temkin and Krahé concerning recovery of records in the hands of third parties (e.g. psychotherapeutic records) underlined the difficulties in designing an effective disclosure regime. Judges acknowledged they frequently departed from “the strict letter of the law”, on the basis that if they did not so “very little if anything would be disclosed”.79

4.10 The underlying problem in the recovery of medical and personal records is the presumptive characterisation of these records as relevant for the defence. There is no need to rehearse all the issues relating to the use of character evidence in sexual offence trials,80 but these issues also lie at the core of disclosure applications. Records may be of value to the defence to try to construct arguments that the complainer is not credible or reliable, in that, for example, she has a history of mental health problems, or has been receiving treatment for previous abuse, factors which lawyers may argue are relevant and seek to exploit.81 Certainly, as in Canada, if a complainant has her own lawyer she has the opportunity to mount a much more robust and individualised opposition to record production than is otherwise likely to occur if left to the prosecution. But even this benefit may be cancelled by the unpredictability surrounding applications for disclosure of records. In Canada it is believed this is a further deterrent for women reporting rape. It has been pointed out that entitlement to legal representation “will do little...to advance the goal of encouraging more victims of sexual and intimate assault to bring their accusations forward. No individual victim who has received counselling can know whether his or her records will ultimately be protected”.82

4.11 The debate on complainers’ rights is complex and Scotland could learn much from the experience in Canada. The absence in the UK of entrenched constitutional rights and the

80 See references at n. 17.
limitations of the Human Rights Act 1998 in imposing positive obligations on the State to protect victims is a general weakness.\(^{83}\) Commentators have also pointed out that the Act lacks a “right to non-discrimination”, and that this has a particularly negative impact on women.\(^{84}\)

4.12 At present in Scotland, the principal route by which a prosecutor can resist a call for production of the complainer’s medical or other personal records is by a claim of public interest immunity. This is a common law right of privilege which entitles a litigant to withhold otherwise relevant evidence on the ground that the evidence is confidential and that the public interest in retaining confidentiality for the records outweighs the interest of the party seeking to have them disclosed.\(^{85}\) In criminal cases the right of disclosure and the claim of privilege go much wider than medical or personal records, and include any evidence in the hands of a third party that might be relevant to the defence. Interpretation and application of the common law principles is the province of the judiciary.

4.13 After two Privy Council decisions in 2005 greatly widened the scope of material that the Crown had to disclose to the defence, it became apparent that a statutory regime might need to be introduced in Scotland.\(^{86}\) Lord Coulsfield was appointed to enquire into the practices in the criminal justice system surrounding disclosure and his report was produced in August 2007.\(^{87}\) The Government subsequently published the Criminal Justice and Licensing (Scotland) Bill 2009 (the Bill), Part 6 of which (sections 85-116) sets out a statutory framework for disclosure and largely reflects the recommendations of the Coulsfield Review.

4.14 In terms of the impact on complainers, the significance of the Bill lies in three sets of provisions. First, section 85 describes the very broad range of material that potentially can be

\(^{83}\) Doak, n. 32; Mowbray n. 34.

\(^{84}\) McColgan, n. 78.


disclosed to the defence. It is “material of any kind (other than precognitions and victim statements) given to or obtained by the prosecutor in connection with the case against the accused.” Although precognitions and victim statements themselves need not be disclosed, information contained in them can be disclosed. Second, the Crown has a duty under section 89 to disclose any material described above in any of the following categories:

(a) information that tends to exculpate the accused,
(b) information that would be likely to be of material assistance to the proper preparation or presentation of the accused’s defence,
(c) information that relates to a material line of the accused’s defence and which is likely to form part of the prosecution case.

Third, there are provisions in section 102 which permit the Crown to apply to the court for a non-disclosure order to withhold from the defence sensitive material if its disclosure satisfies any of the following criteria, i.e. it:

(a) would be likely to cause serious injury, or death, to any person,
(b) would be likely to obstruct or prevent the prevention, detection, investigation or prosecution of crime,
(c) would be likely to cause serious prejudice to the public interest.

4.15 The difficulty for complainers is that there is no statutory provision that recognises their privacy interests. Instead their interests are bundled in with the “public interest”. As has long been established in Canada, privacy interests are of the utmost value to the individual, are distinct from the public interest, and should not simply be subsumed under the category of “public interest” in determining whether the criteria for non-disclosure has been met. Moreover, accurate identification, categorisation and protection of a complainer’s privacy interests rests entirely in the hands of the Crown, which inevitably sets up scope for tensions between competing interests.

88 Section 85(1) and (2)(a) and (b).
89 Section 89(4)(a)-(c).
90 Section 102(2)(a)-(c) and s. 102(3).
4.16 At the stage of deciding whether non-disclosure is justified, it is the judiciary who have the task of balancing the interests of the complainer, the public and the accused.\footnote{Section 106 (2).} Thus the gate-keeping role currently performed by the judiciary in determining the admissibility of sexual history and character evidence, will be replicated in this exercise, leaving decision-making very much to judicial discretion. The issue that will require careful reflection in Scotland is whether the Bill’s provisions constitute adequate safeguards for the rape complainer and satisfy the requirements of articles 3 and 8 of the ECHR.

**REPUBLIC OF IRELAND**

4.17 The Irish Law Reform Commission had rejected ILR for complainants 10 years prior to the findings of the Irish study.\footnote{Rape and Allied Offences, LRC 24-1988, Law Reform Commission, Dublin, Ireland, paras 40-42.} \footnote{http://www.lawreform.ie/publications/reports.htm} They argued that the problems facing complainers were not so great as to justify a radical shift in trial procedure. They considered ILR would conflict with the paramount objective of the trial, i.e. the ascertainment of the guilt or innocence of the accused. They expressed doubts about its constitutional propriety and claimed it would complicate hearings and alienate the jury, though no evidence was produced to support these objections.\footnote{Rape and Allied Offences, n. 94 at para 42.}

4.18 However, since 2001 the Irish have operated a limited form of legal representation. Section 34 of the Sex Offences Act 2001 permits a woman to have her own lawyer to oppose applications for the introduction of sexual history evidence. Such an application can be made pre-trial or during the trial. But the legal representation starts and finishes at the application stage. Thus if the application is allowed by the judge the complainant has no further legal assistance. Rape crisis groups argue this is insufficient and continue to press for its scope to increase.\footnote{Rape Crisis Network Ireland (2007) *Submission to Balance in the Criminal Law Review Group*. For an evaluation of these provisions in see C. Hanly, D. Healy and S. Scriver (2009) *Rape and Justice in Ireland*, Dublin: Liffey Press.} However, in their recent consideration of the balance between the rights of the
accused and those of the complainant, the Criminal Law Review Group did not consider the extension of ILR to be an option.\textsuperscript{96}

SOUTH AFRICA

4.19 The South African Law Reform Commission has also considered introducing legal representation for victims. In a 2002 Discussion Paper,\textsuperscript{97} the Commission seemed only to consider the German \textit{nebenkläger} status. It ultimately rejected this as inconsistent with the state’s “constitutional imperatives” as prosecutor, and contented itself with recommending other measures to reform evidence and procedure. The Commission noted:

Legal representation plays an important role in enabling persons to enforce their rights, for rights have no meaning unless the people who have those rights are aware of them, their significance, and how to use them effectively…

It should be recognised that with regard to the investigation and prosecution of sexual offences, the interests of the complainants are different to those of the State. The question is whether allowing the victim to participate in the trial as an ancillary prosecutor is the best manner in which to solve the problems inherent in a sexual offence trial conducted within a largely adversarial system.\textsuperscript{98}

4.20 It is not surprising that the Commission ruled out \textit{Nebenkläger} since it is patently incompatible with an adversarial system in common law jurisdictions, at least in the form that system is presently conceived. \textit{Nebenkläger} installs a second prosecutor into the trial process which would radically alter the equality of arms principle underlying article 6 of the ECHR and fairness to the accused. The Commission may have turned naturally to consider that option given South Africa’s origins as a state with a mixed civilian and common law background, but it is unfortunate they did not explore a more flexible arrangement. In their response to the Discussion Paper, academics from the University of Cape Town drew the

\textsuperscript{98} Discussion Paper 102, n. 96, Executive Summary at pp. 26-27.
Commission’s attention to alternative versions of ILR and countered the constitutional argument:

In relation to sexual offences cases victim's lawyers [sic] have the potential to fill a substantial gap created by the reality that existing role players fulfil pre-allocated roles within the process and that our criminal justice system suffers from chronic under-resourcing and often serious attitudinal problems. If narrowly and clearly circumscribed we believe that legal representation for the victim of sexual offences would withstand constitutional scrutiny. This is not least because providing support to the victim and assisting her in a way that ensures that she testifies cogently and coherently can only serve to benefit the process.99

ENGLAND & WALES

4.21 It is not necessary to dwell for long on the position south of the Border. England and Wales have had similar experiences and problems in the investigation and prosecution of rape as are evident in Scotland, as many of the materials cited in this Report illustrate. However, English law has been prepared to be quite ambitious with numerous other reform initiatives including the introduction of specialist prosecutors, requiring judges who try rape trials to be ticketed i.e. specially trained to do so,100 and permitting the use of intermediaries to assist vulnerable witnesses (usually children) to give evidence.101 Most recently, the UK government has funded a pilot programme of Independent Sexual Violence Advisors for England and Wales.102 These are professionally trained specialists who will become involved with victims from the earliest possible opportunity after an attack has been reported. Their purpose is to establish a rapport at the outset and remain as a supporter and adviser to complainants throughout the legal process.

100 For discussion of the impact of these see Temkin and Krahé, n. 80 at p. 191 and pp. 196-197.
102 For details of this scheme see http://www.homeoffice.gov.uk/crime-victims/reducing-crime/sexual-offences/sexual-violence-advisors
CHAPTER FIVE

THE STATUS OF THE COMPLAINER IN SCOTS LAW

INTRODUCTION

5.01 Since devolution in 1998, both the Scottish Executive and its successor the Scottish Government have initiated policies and law reforms designed to improve practice and make victims of sexual offences feel better informed and supported. Most recently the government has produced self-help information packs for those who have been raped or sexually assaulted,\(^{103}\) and supported public education campaigns by Rape Crisis Scotland to challenge myths and stereotyping.\(^{104}\) To date, Scotland has not shown signs of following England in proposed measures to educate juries about rape myths through jury information packs,\(^{105}\) though Scotland has legislated for the use of expert evidence in tightly prescribed circumstances.\(^{106}\) However, the Crown Office has taken a number of important initiatives to modernise the prosecution service, including the appointment and training of specialist Crown counsel, the expectation that prosecutors will now have pre-trial contact with complainers,\(^{107}\) and the establishment of a National Sex Crimes Unit. Many of these reforms emanated from the fifty recommendations of the Crown Office Review in 2006, all of which are now implemented\(^{108}\).

5.02 Currently, in the Scottish adversarial system there are no legal rights of representation for complainers. There are no rights of audience before the courts for lawyers in a criminal

\(^{103}\) See [http://www.scotland.gov.uk/Publications/2008/04/16112631/0](http://www.scotland.gov.uk/Publications/2008/04/16112631/0)

\(^{104}\) See [www.thisisnotaninvitationtorapeme.co.uk](http://www.thisisnotaninvitationtorapeme.co.uk)


\(^{106}\) Vulnerable Witnesses (Scotland) Act 2004, section 5.

\(^{107}\) In England and Wales a complainant can request a meeting with the prosecutor. See the information at [http://www.cps.gov.uk/publications/prosecution/witnesseng.html](http://www.cps.gov.uk/publications/prosecution/witnesseng.html)


trial, other than the prosecutor (on behalf of the Crown) and the defence (on behalf of the accused). The Crown prosecutor is “master of the instance” and has complete discretion as to whether to pursue a prosecution, plea bargain, or abandon the prosecution at any stage. The Crown prosecutes on behalf of the public interest, and only takes proceedings if it is in the public interest to do so. The Crown therefore necessarily has a much wider remit than the interests of the complainer.

EXISTING LEGAL SERVICES FOR COMPLAINERS IN SCOTLAND

5.03 At present, victims of a crime can consult a solicitor privately, for example, to pursue a claim for criminal injuries compensation,\(^{109}\) or to explore the merits of a civil action for damages against the alleged perpetrator.\(^{110}\) For those victims who cannot afford to instruct a solicitor privately, there is limited scope under the Legal Advice and Assistance Scheme, or advice can be sought from the CAB or other legal advice centres. More often, survivors of sexual assaults will turn to the local rape crisis centre, Victim Support or similar organisation for information. All of these voluntary bodies provide excellent advice and support but they do not offer specialist legal advocacy or representation.

5.04 As matters presently stand, most complainers do not understand why the Advocate Depute, as Crown prosecutor, does not perform any kind of representative role for them. As Burman et al. explained in their study, “complainers expressed a belief that the role of the Advocate Depute was somehow to be ‘on their side’ or that the Advocate Depute was ‘their lawyer’”.\(^ {111}\) While this could be dismissed as a simple misconception about the role of the Crown, that fails to acknowledge the widespread and justified expectation of complainers that, at the very least, someone is charged with the exclusive duty to protect their rights to dignity and respect. This expectation is echoed repeatedly in the research literature where complainers consistently describe feeling that they are left to face the ordeal of court

\(^{109}\) Though note that even the fact of an application for criminal injuries compensation has been used in Scotland in cross-examination to discredit complainers by inferring their allegation of rape is motivated by financial gain, e.g. *Cumming v HM Advocate* n. 14.

\(^{110}\) For the scope for such actions, even where the prescriptive period has expired, see the House of Lords ruling in *A v Hoare* [2008] UKHL 6.

\(^{111}\) Burman et al., n. 10 at para 9.21.
proceedings alone.\textsuperscript{112} The fifteen participants in the Irish study reported predominantly negative reactions including “feelings of loneliness, stress, humiliation or detachment” based upon lack of representation.\textsuperscript{113} It is those feelings that have to be countered. No-one doubts that a complainer may well have an unpleasant, uncomfortable and testing time in the witness box but she does not have to do so feeling alone, humiliated and detached throughout that process.

THE ROLE OF THE PROSECUTOR

5.05 The Crown Office Review published in 2006 was a root and branch appraisal instigated by the Lord Advocate, Elish Angiolini QC. The Review reiterated the role of the public prosecutor in this way:

\begin{quote}
Of fundamental importance is the duty of the prosecutor to act independently of any other person, a duty which is enshrined in the Scotland Act 1998. The prosecutor represents the wider public interest and not an individual victim of crime. In addition, the prosecutor has a duty to ensure that the accused is treated fairly in the criminal justice process. Prosecutions must be premised upon a thorough, fair and impartial investigation and analysis of the evidence.\textsuperscript{114}
\end{quote}

5.06 This statement reveals the awkward juxtaposition of the two distinct roles that the prosecutor is expected to fulfil. The emphasis in the quote above on the positive “duty to ensure that the accused is treated fairly in the criminal justice process” alongside the reminder that the prosecutor does not represent “an individual victim of crime” nicely captures the dilemma. While it is an entirely proper representation of the prosecutor’s responsibilities towards the accused it does beg the question of how the Crown can fully discharge their duty to ensure that the complainer is treated fairly whilst also ensuring that the complainer’s interests are not compromised.

\textsuperscript{112}E.g. G. Chambers and A. Millar (1986) \textit{Prosecuting Sexual Assault}, Edinburgh: Scottish Office Central Research Unit.

\textsuperscript{113} Bacik et al., n. 38 at p.13.

\textsuperscript{114} Crown Office Review, n. 28 at para 1.7.
5.07 In no sense does the Crown act “on behalf of” the complainer, nor does the Crown represent her interests beyond taking account of those interests within the broader duty to prosecute in the public interest. The Crown is not there to represent the complainer, in the way one would normally understand legal representation. The complainer is not a client. The advocate-depute is not her lawyer. The role of all witnesses, including the complainer, is to provide testimony upon which the Crown founds a prosecution if there is sufficient evidence. Moreover, some of the Crown duties, such as the duty of disclosure and the duty to ensure all relevant, admissible evidence is before the court even if it harms the Crown’s case, actively conflict with the interests of the complainer. Irrespective of how well-intentioned the Crown aspirations are, it is self-evident that these duties are not compatible with the privacy interests of complainers and the latter have to be compromised.

5.08 It was noted in Chapter 4 that the Crown Office Review authors rejected a pro-active approach to prosecutorial case-building where that involves any kind of direct contact with the complainer. They considered several important features of the Manhattan model to be contrary to the Scottish practice of an independent prosecution service and “inconsistent with the professional rules and code of conduct governing those advocates with rights of audience in the High Court”.\footnote{Crown Office Review, n. 28 at para 10.9.} That code, the \textit{Guide to the Professional Conduct of Advocates}, states in its current edition\footnote{Guide to the Professional Conduct of Advocates (2008, 5\textsuperscript{th} ed.) Edinburgh: Faculty of Advocates at \url{http://www.advocates.org.uk/downloads/guidetoconduct_5thedition.pdf}}:

\begin{quote}

\textbf{Interviewing witnesses}

6.3.9.1. There is no general rule that an advocate may not discuss the case with a potential witness, but an advocate, when instructed by a solicitor, is entitled to insist that he accepts instructions on the basis that he, the advocate, will not do so.

6.3.9.2. Once a proof or trial has begun, an advocate must not interview any potential witness in relation to what has been said in court in the absence of that witness.
\end{quote}
6.3.9.3. Under no circumstances should Counsel do or say anything which suggests to a witness that he should give evidence other than in accordance with the honest recollection or opinion of the witness. An advocate must avoid doing or saying anything which could have the effect of, or could be construed as, inducing the client or a skilled witness to “tailor” his evidence to suit the case.

These provisions do not preclude communication between an advocate and a complainer. The Crown Office Review recommended that trial prosecutors should introduce themselves to the complainer and answer any questions and this practice is apparently now in place.\footnote{Crown Office Review, n. 28, p. 24 at para (41).} However, such contact comes very late in the process and perhaps too late to dispel a complainer’s anxieties.

5.09 In some respects the US Manhattan model is not so alien to the Scottish model. It is already COPFS practice to precognosce complainers prior to trial and the Crown Office Review recommended invigorating that process with a more purposeful approach to anticipating and countering credibility issues.\footnote{This is not the practice everywhere in the UK, e.g. the Crown Prosecution Service in England & Wales does not become involved in interviewing witnesses, though some commentators have urged that they should do so, e.g. Ellison, n. 73.} However, as noted earlier, the manner in which US specialist prosecutors align themselves with the complainant’s interests to present the best possible case is not regarded with approval in Scotland. As a result, although impressed by the Manhattan model, the Crown Office Review felt obliged to reject it on the ground of its unsuitability for Scots law. Its authors remained confident that a blend of improved training and guidelines for prosecutors, coupled with a comprehensive support service from the Victim Information and Advice body (VIA) could deliver similar benefits.

5.10 One might then pose the question, “who does look after the complainer’s interests?” and in theory the answer is that witnesses, including the complainer, have their interests looked after by the Crown and, during the trial, by the judge. The latter in particular is there to oversee a fair trial and that includes preventing inappropriate treatment of witnesses.
5.11 How well advocate-deputes or judges discharge those responsibilities has been the focus of previous criticism in Scotland. In one of the earliest reviews of the Scottish prosecution of sexual offences, in 1986, Chambers and Millar noted:

Many women contrasted the fiscal’s impartial position with the interventionist role of the defence agent or advocate. It has been argued that the prosecutor’s impartiality left complainers open to attack and created an imbalance in the conduct of trials and in the way the evidence was presented.  

5.12 Six years later, in their evaluation of the first set of reforms introduced to regulate the use of sexual history evidence, Brown et al. found that neither judges nor advocate deputes were likely to intervene in cross-examination of the complainer, not least because they were unconvinced of the need for the reforms in the first place. Brown et al. considered non-intervention arose from deeply shared cultural understandings as to what constituted ‘relevant’ sexual history evidence, such that there was little resistance by the lawyers on either side to its introduction. This is a phenomenon noted elsewhere. In Australia, Karmen has observed that when legal professionals are unconvinced of the need for law reform the status quo may be difficult to disturb because of the “latitude and discretion” afforded to such professionals to leave things as they are.  

5.13 With the advent of the Human Rights Act, and the specific incorporation of the duty on the trial judge in s. 8 of SOPESA, to ensure “appropriate protection of a complainer’s dignity and privacy”, one might assume a far greater level of judicial intervention would be the norm today, but that appears not to be the case. The Burman et al. 2007 evaluation study found “objections by the other party and / or interventions by the court occurred infrequently”. In the 32 observed trials where the court had approved applications to lead evidence under s. 275, approximately one half of those (14) introduced some evidence or

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119 Chambers and Millar, n. 113 at p. 131.
123 Burman et al., n. 10 at para 7.8.
questioning during the trial which had not been explicitly agreed to by the court. \textsuperscript{124} Those 14 applications – which the researchers regarded as breaches of the statute – led to only 7 objections, of which 5 were made by the Crown, one by the defence, and one intervention came from the bench. \textsuperscript{125}

5.14 In many respects this is not surprising. Prosecutors and judges have to balance other interests alongside those of the complainer – both have to consider the public interest and be vigilant in regard to the rights of the accused to a fair trial. That inevitably creates a predicament, because the complainer’s interests cannot be given due attention when they have to be compromised within a framework of broader, often directly conflicting, interests. In addition, prosecutors sometimes apply for permission to lead sexual history or other character evidence where they perceive a strategic advantage in leading such evidence in the examination in chief rather than wait for the issue to be raised, less sympathetically, in cross-examination. This is the sort of tactical approach that may be lost on a complainer if it is not explained to her in advance, leaving her feeling confused and undermined. But prosecutors might well be reluctant to raise tactics with a complainer for fear it is perceived as “coaching”. For their part, judges may be loathe to intervene to prevent or restrict cross-examination in case it leads to grounds of appeal. \textsuperscript{126} Arguably, it is this type of vacuum in complainer protection which ILR has the potential to fill.

5.15 The public prosecutor must function independently, and be seen to be free from favour, bias or prejudice, but it is precisely because of that requirement for independence that other jurisdictions throughout Europe have developed alternative mechanisms for representing complainants’ legal interests. These countries have recognised that it is not feasible for prosecutors to take account adequately of complainers’ interests alongside the interests of other parties.

5.16 One might question why rape complainers merit differential treatment from other complainers or witnesses. There are three obvious responses to that. In the first place there is the statutory duty imposed by s. 275 (2) (b) of the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002, (SOPESA) which singles out the right of the complainer in

\textsuperscript{124} Burman et al., n. 10 at para 7.55.
\textsuperscript{125} Burman et al., n.10 at para 7.8.
\textsuperscript{126} See for example, \textit{Black v Ruxton} 1998 S.L.T. 1282.
sexual offences to protection of her dignity and privacy. Secondly, there is ample empirical evidence to justify a higher degree of support and protection from prosecutors or judges for sexual offence complainers than is generally available to witnesses. The needs of the victim of sexual assault are manifestly greater and more complex that those of complainers of non-sexual offences or of other non-victim witnesses. Many rape victims and complainers experience profound and sustained psychological trauma, with further damaging effects on their physical health, their relationships, and their ability to continue in employment.\textsuperscript{127} Lastly, in justification of differential treatment, the quality of support a complainer receives impinges on the quality of her testimony. The less support available the less likely the complainer will achieve best evidence:

...if an individual is traumatised by their court appearance, then this can affect what they say in court, how they say it and consequently their credibility in the eyes of others, such as the judge or jury.\textsuperscript{128}

THE ROLE COPFS ASPIRES TO PERFORM

5.17 Notwithstanding the closely defined public interest role of prosecutors, COPFS has expressed a clear wish to modernise and, as discussed earlier, they have taken some very significant steps to improve how they discharge their responsibilities to complainers. The Crown Office Review expressed the commitment of COPFS “to providing a high quality service to victims of sexual offending”\textsuperscript{129} largely through improvements in training, coordination of service and consistency of decision-making.

5.18 One such area for improvement is the desire to establish greater trust between precognoscers and complainers. As the Review authors noted, distrust at the precognition stage prevents a full exploration of apparent inconsistencies and weaknesses in a complainer’s statement. Although a reluctance to press these issues at the precognition stage


\textsuperscript{129} n. 28 at para 1.8.
is often out of a concern not to undermine the complainer, this can have detrimental consequences.

5.19 A general reluctance to focus on possible areas of weakness means that if allegations raised at cross-examination have not been explored earlier with a complainer she has no opportunity to provide the prosecutor with information to counter these allegations. This wrong-foots prosecutors and leaves them in court with “no basis on which to contradict evidence”.\(^{130}\) It might also lead to a prosecution proceeding where the prosecutor has clear doubts exist over the complainer’s credibility and reliability, but she has not been warned of these.

5.20 One can fully appreciate the merits of developing a more frank and trusting relationship between complainer and precognoscer, but one can also anticipate problems with its realisation. Unless women start the report process assured that they will be believed then it would take a very trusting woman to be confident that the authorities, notably the police and COPFS, will be more receptive to her account by virtue of her candidness. Complainers have good reason to be wary of disclosing to precognoscers potentially “awkward” evidence, given that experience shows it might well be manipulated or misinterpreted and used against them in cross-examination. More fundamentally, it may be contrary to her interests to persuade her that it is worth disclosing everything in circumstances where the Crown have other interests to consider, not least their duty of disclosure to the defence of all material evidence they amass. The precognition relationship is therefore beset by the same conflicting responsibilities that prevent prosecutors from acting as advocates or representatives for the complainer. That makes the aspiration for greater trust most elusive. The worst of all worlds would be for women to believe that complete openness on their part would protect them from trauma or humiliation in the witness box.

5.21 These doubts are not in any sense to detract from the aspirations laid out in the Crown Office Review to continue to improve the service offered to complainers, aspirations that are regularly re-stated by the Lord Advocate and the Justice Minister. Undoubtedly, better liaison, information flow and improved levels of trust between the complainer and the precognoscer will make a positive difference to women’s experience. However, none of these

\(^{130}\) Crown Office Review, n. 28 at paras 6.11 and 9.40.
shifts is able to resolve the fundamental conflict of interest that exists between the office of the public prosecutor and the private interests of the complainer. Ultimately, these conflicts become more prominent in the march towards the trial.
CHAPTER SIX

WHAT COULD ILR OFFER A COMPLAINER?

INTRODUCTION

6.01 The next two chapters consider what benefits ILR could bring to complainers and to the investigative and prosecutorial process in Scotland. This chapter outlines the various contexts and types of proceedings where ILR could potentially operate. Most complainers have a greater need for information and support than is presently provided by criminal justice agencies. If the desire was simply for information about forthcoming trial dates, or the outcome of a section 275 application, or indeed the outcome of the trial or a subsequent appeal, then certainly non-specialist personnel can usually provide this. But many complainers want and need much more than information. Many aspects of criminal procedure and prosecutorial decision-making are confusing and complex. Understanding and participating in this process is all part of coming to terms with the stress of past trauma and forthcoming potentially disappointing outcomes. The list that follows is illustrative rather than exhaustive. The points during an investigation and prosecution at which complainers might wish access to impartial legal information, advice, assistance and/or representation arise at numerous stages.

PRIOR TO THE DECISION TO REPORT

6.02 Complainers need specialist advice to understand what is involved in:

- making the report and beyond
- the impact if they change their mind and seek to withdraw their complaint
- what they can expect / require of the police
- their options in regard to a medical examination
- the impact of a perceived delay in reporting

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131 The process in which the defence apply to the court to introduce sexual history or sexual character evidence.
132 Chambers and Millar, n. 113.
133 Averill n. 53.
the inevitable focus on character
- requests to access personal records including historical medical records.\textsuperscript{134}

**POST-REPORT AND PRIOR TO DECISION TO PROSECUTE**

6.03 At this stage complainers need information and advice concerning:
- key stages of the investigation process, e.g. if the perpetrator has been apprehended if he was someone not known to the complainer, or when a report is passed to the Procurator Fiscal
- the question of whether a prosecution is to proceed and if not, why not
- the period following arrest, to allow them to influence decisions on bail/bail conditions
- any decision about accepting a partial plea or a plea to a lesser charge.

**FROM REMAND OR BAIL TO TRIAL**

6.04 At this stage complainers need guidance on:
- how to respond to defence requests to precognosce them
- options to apply for vulnerable witness status and special measures
- opposition to applications for medical records, school, care, counselling and other personal records
- opposition to applications under s. 275 for permission to ask questions on sexual history or character
- court familiarisation – visits and explanations of court procedure
- making an application to clear the court of the public while she is giving evidence
- making a victim impact statement
- criminal injuries compensation and other civil remedies such as an action for damages, or interdict.

6.05 Responsibility for passing on information and making applications to the court falls across a number of agencies and evaluation research suggests the flow of information is

\textsuperscript{134} i.e. not merely the medical reports relating to any medical treatment following the attack, but, given the Canadian experience, potentially records going back many years. See *R v Mills* [1999] 3 S.C.R. 668.
highly variable.\textsuperscript{135} Many complainers may not even know of their options, or what information is passed to the defence, let alone have their options discussed with them by a legal adviser. In the past at least, it appears that many complainers have felt that their wishes and views did not always reach Crown prosecutors and in some cases even appeared to be ignored.\textsuperscript{136}

IMPLEMENTING INDEPENDENT LEGAL REPRESENTATION

6.06 If ILR were to be implemented it would require primary legislation to introduce changes to procedural rules to accommodate the complainer’s new rights. Much depends on the form of legal representation one seeks to introduce. At the stage of reporting a crime little difficulty arises if the complainer’s lawyer’s role is confined to one of advice-giving, information and support.

6.07 However, it is the expansion of that role to one where the complainer’s lawyer has rights of access to the evidence – police witness statements, forensic reports, and the complainer’s medical and other personal records – which some will perceive as more problematic. A predictable objection would be that such rights of access could in effect put the complainer’s lawyer in a position of an “ancillary prosecutor”, a shadow to the Crown prosecutor, thus increasing the extent and weight of the cross-examination that the accused might face.

6.08 Certainly, if the prosecutorial challenge to the accused was such that the balance between the parties would be tipped unfairly against him, then that would be a breach of article 6. However, the appointment of an independent lawyer need only impinge on the accused’s ability to exercise his rights if he elects to give evidence, and, in addition, a right of cross-examination is granted to the complainer’s lawyer. That would represent one model of ILR, but there are many other models that may be more suitable for Scots criminal procedure. The accused has a substantial set of rights that are unaffected by ILR. For example, in Scots law the accused is not obliged to give evidence in court, and in fact rarely does so in rape trials. He does not therefore need to subject himself to any cross-examination, let alone two

\textsuperscript{135} Burman et al., n. 10; Richards et al., n. 11.
\textsuperscript{136} Chambers and Millar, n. 113
periods of it. In such circumstances it is hard to see what additional harm the accused faces by the appointment of a lawyer for the complainer who is merely charged with fulfilling those aspects of the role the Crown prosecutor cannot.

6.09 In jurisdictions which have introduced ILR, there are various ways in which the powers of the legal representative are constrained. For example, in some jurisdictions the complainant’s lawyer has access to prosecution papers but must not disclose these to the complainant. It is clearly possible to make a significant difference to the experiences of complainants and to prosecution outcomes even with limited powers of representation and intervention. For example, a representative can achieve quite a lot even if confined to interventions during any cross-examination stage of the complainant, and/or to objections to the production of records or the introduction of sexual history evidence.

6.10 In Scotland, if information gained by the complainant’s lawyer was used solely to anticipate the defence cross-examination, and not to brief or coach the complainer in any way, then it is arguably no less than she is already entitled to, but fails to receive. The appointment of their own lawyer would give complainers an important sense of continuity. One legally qualified source would replace the current fragmented arrangements whereby a host of bodies, statutory and voluntary, deliver advice and support but where the risk of information not being collected or communicated to the correct party at the right time is significant.

6.11 Much of the evidence to which the legal representative would wish permission to access may well be within the complainer’s gift to grant. She would be able to consent to the release of her police statement to her lawyer, and to consent to access to her medical or other personal records. The complainer will very often be the best source of the type of information that an independent representative would want to know without the need to access information in the hands of third parties.

137 Temkin, 2002, n. 17.
138 A point noted in Without Consent (2007), n.1 at pp. 17-18.
139 Section 62 of the Criminal Justice and Licensing (Scotland) Bill 2009, currently being debated in the Scottish Parliament, proposes that a witness in a trial would be able to use their police statement while giving evidence in court to avoid the witness testimony being reduced to a memory test.
6.12 Where a complainer wished her lawyer to accompany her during precognition, to make submissions in plea negotiations, or to oppose bail applications, adjournments and sexual history applications, she would again be the best source of information from which an adviser could devise grounds for these interventions. A lawyer would not necessarily require access to information in the hands of the Crown, though there would be bound to be some occasions when the lawyer was disadvantaged if such access was denied.

6.13 At the pre-trial stage, if the role of the complainer’s lawyer was limited to one where there were rights to object to the production of personal records or to the introduction of sexual history or character evidence, then the tension with equality of arms is minimised. Arguably, there is no tension at all in that the lawyer would only be performing that dimension of the role which Crown prosecutors are constrained from discharging due to the other interests they must protect.

6.14 Restricting the role of an independent lawyer would also limit the extent to which it could give the defence additional grounds for appeal. Successful interventions by the complainer’s lawyer could of course be appealable.
CHAPTER SEVEN

IS THERE A CASE FOR ILR IN SCOTLAND?

INTRODUCTION

7.01 Although ILR is commonplace throughout Europe, it has not received detailed consideration within Scotland. This chapter considers the conceptual difficulties that one could anticipate in regard to a proposal to introduce ILR in Scotland. It is frequently asserted that the adversarial system cannot accommodate any form of third party representation.  

In Scotland, one could anticipate this concern crystallising in three substantive objections of principle:

1. ILR breaches the right of an accused to a fair trial
2. ILR is unnecessary as the Crown has responsibility for the complainer’s interests
3. ILR is unnecessary as the trial judge can intervene to protect the complainer’s interests.

7.02 Further procedural objections to ILR concerning, for example, the extended length of proceedings, complexities over disclosure rights and the additional cost to public funds of ILR are also often raised. However, these are incidental to the substantive objections, and could be overcome if the latter were satisfied. Any serious proposal to introduce ILR in Scotland must therefore address the substantive objections.

DOES ILR BREACH THE RIGHT TO A FAIR TRIAL?

7.03 As discussed above, opposition to ILR often stems from a concern that if a complainer had separate representation that would disrupt the principle of equality of arms and the right of an accused to a fair trial as he would face “two” prosecutors. That concern would be understandable if a model similar to the German or Norwegian Nebenkläger regime was

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140 See for example, objections raised in responses to the Consultation Papers published by the Irish Criminal Law Review Group and the South African Law Commission and discussed in their final reports at, respectively, ns. 94 and 98.
being proposed. However, that is not the sole model available. As discussed in Chapter 3, there are many variations on the theme of ILR and few countries adopt a model where the independent lawyer performs a duplicate prosecutorial function. If the scope of the complainer’s representation was limited to filling the gaps in protection identified in previous chapters then, given the level of safeguards to ensure a fair trial for the accused, it is hard to see what material prejudice is presented.

7.04 The safeguards surrounding the right to a fair trial, of which Scotland is rightly proud, far exceed those available in some other ECHR compliant jurisdictions. They include the presumption of innocence, the burden of proof on the Crown, the right against self-incrimination, the need for corroboration, the rule against hearsay evidence, the rule against privilege, the 110 day and 140 day rules,\footnote{141} as well as extensive rights to legal aid. As noted earlier, reflecting the presumption of innocence, Scots law does not require an accused to go into the witness box, or indeed say anything at all to the police during the pre-trial investigation. ILR for complainers would not displace any of these substantive safeguards.

7.05 There is no provision in the ECHR that specifically prevents ILR being introduced in Scotland. As the Strasbourg court has observed on many occasions, states have an obligation under the Convention to ensure a fair trial. How they discharge that obligation varies and the whole range of safeguards in place to protect accused persons has to be assessed, not merely one single component of the trial procedure. Notably, other countries with legal systems that are at least partially adversarial, e.g. Denmark, Norway and Ireland, have incorporated aspects of ILR into their law without difficulty.

7.06 Scots law considers itself a flexible, hybrid legal system and it has already accommodated a range of distinctive procedures that amount to forms of third party intervention or representation, sometimes from persons who are not even legally qualified. When a legal system has that number of exceptions to the general exclusionary principle it suggests the principle is neither impermeable nor absolute. Thus, to illustrate, the principle of “two parties only” has been relaxed in the following circumstances where there is scope at common law or by statutory authority to appoint a third party representative:

\footnote{141}{See s. 65 of the Criminal Procedure (Scotland) Act as amended by the Criminal Procedure Amendment (Scotland) Act 2004.}
i. a safeguarder to a child in the Children’s Hearings system

ii. an “appropriate adult” to accompany vulnerable people being interviewed at police stations

iii. an amicus curiae for civil court cases

iv. a McKenzie friend, chosen by party litigants in civil court cases

v. a public protection advocate to represent victims’ views at Parole Boards

vi. solicitors or counsel in sexual offence trials to conduct those parts of the trial prohibited to accused persons who seek to represent themselves

The conditions under which most of these appointments operate are tightly regulated. Nonetheless, their existence demonstrates accommodations can be made and there is therefore a foundation upon which it would be possible to introduce some form of ILR. Given the existence elsewhere in the democratic world of wide variations in ILR schemes, it ought to be possible to devise one that fits with Scottish procedure. To argue from principle alone that the appointment of a lawyer to represent a complainer would never permit a fair trial is not supported by Strasbourg jurisprudence.

7.07 Other jurisdictions with adversarial systems have noted when rejecting proposals for ILR that questions of constitutional propriety may arise if the complainer’s lawyer had full rights of audience. But ILR can bring many benefits with significantly less than full rights of audience. At the trial stage, representation could, as in the Republic of Ireland for example, be limited to a right to object to oppose defence applications to admit sexual character evidence. Granting rights to complainers does alter their legal status, but that need not compromise the substantive rights of the accused. It is not a zero sum game, where additional rights for complainers can only be gained at the expense of a fair trial for the accused.

7.08 There is a significant margin of appreciation given to states to construct their own rules of evidence and procedure, and provided the overall regime is fair the European Court of

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142 See, for example, the debates in Canada, South Africa and Ireland detailed in Chapter 4.
Human Rights will not rule against it. Scotland is not considering ILR from a position where an accused person is disadvantaged in terms of procedural and evidential safeguards in comparison with his counterparts elsewhere in Europe. On the other hand, Scotland has the lowest conviction rate for rape in Europe and, to echo the words of the Lord Advocate, Eilish Angiolini, “we operate within one of the most restrictive legal frameworks in the world.”

IS ILR UNNECESSARY AS THE CROWN FULFILS THIS ROLE?

7.09 Much is made in Scotland of the duty of the Crown prosecutor to take the complainer’s interests into account, thereby rendering ILR superfluous. It might be argued that a rape complainer is no different from any other witness in criminal proceedings. To permit her to have independent representation would give her an unprecedented advantage over other witnesses and other types of proceedings and would be contrary to the traditions of the adversarial process.

7.10 The argument that the interests of complainers are adequately protected by the prosecutor is not a view shared by complainers. Neither is it satisfactory to conflate the needs of complainers with those of any other witnesses. As detailed earlier, rape complainers are a special case with multiple and distinctive complex needs.

7.11 The Crown acknowledges the complainer’s interests constitute but one of several competing sets of interests for which they have responsibility. Prosecutors cannot commence proceedings unless they are satisfied it is in the public interest to do so. In assessing the public interest prosecutors must take account of both the interests of the complainer and the interests of the accused. Even if one took the debatable view that the complainer’s interests can be entirely aligned with the public interest, one cannot conceivably argue that a complainer’s interests are aligned with those of an accused. As the Crown Office Review

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144 Comment made during her speech in the Scottish Parliament whilst introducing the debate on 5 March 2008 on the Sexual Offences (Scotland) Bill at Col 6664: http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-08/sor0306-02.htm#Col6662
emphasised, “The prosecutor represents the wider public interest and not an individual victim of crime.” The “protection” thus offered a complainer is therefore very limited and at the discretion of the prosecutor. Prosecutors cannot press the complainer’s interests above the interests of others. They cannot take instructions directly from a complainer. There is no lawyer-client relationship between a prosecutor and a complainer – and thus none of the characteristics of that relationship based upon trust, confidentiality and legitimate partisanship.

7.12 The Crown’s role as a public prosecutor and officer of the court inevitably restricts the scope for supporting the complainer. Her interests are subordinated to wider concerns, possibly without even the opportunity of being canvassed before a judge. This falls a long way short of what a complainant in other countries is entitled to from a legal representative. It also falls a long way short of what complainers say they need in order to give their best evidence with confidence and without fear or humiliation. The traditional duties expected of prosecutors in accommodating multiple roles belong to an era where there was little demand for transparency, clarity of function, or recognition of victims’ rights. In today’s world, it is arguably not possible to perform the role of public prosecutor as well as promote the best interests of the complainer as these interests are fundamentally in competition and not easily reconciled. The conflict facing the Crown is placed in sharpest relief in two situations that arise frequently in a sexual offences prosecution: recovery of personal records and introduction of sexual history evidence.

DISCLOSURE OF RECORDS

7.13 It is a long-standing principle in Scots law that the Crown is obliged to disclose to the defence relevant material in their hands as a result of the investigation process. The equality of arms principle, a component of the right to a fair trial, entitles the defence to have access to the same documentation that is available to the Crown. This is so even if the Crown has no intention of relying upon it as evidence. The defence will always wish to examine these documents for any exculpatory benefit they may have for the accused.

146 n. 28 at para 1.7.
147 Chambers and Millar, n. 113.
7.14 Most jurisdictions have a statutory framework setting out the criteria that have to be met before the courts will order disclosure. Most regulate the flow of information, some of which would otherwise be considered personal and confidential to the complainer, by limiting the documents that require to be disclosed to those that are “material” to the preparation of the defence or some similar standard. However, what constitutes “material” may need to be vigorously disputed in order to protect the complainer’s privacy. The experience of other jurisdictions demonstrates that a very robust framework for disclosure has to be put in place to sift applications for disclosure as defence counsel tend to pursue a range of strategies, many of which are effectively “fishing expeditions”.

7.15 Most regimes differentiate between the disclosure of records which are already in the hands of the prosecution, such as police statements, forensic reports and previous convictions; and those in the hands of third parties such as counselling records, psychiatric records and social work records. The former category is generally uncontroversial. In sexual offence trials in particular, the latter category is much more problematic.

7.16 Lord Coulsfield’s Review of the Law and Practice of Disclosure identified one of the categories of evidence that should be disclosed to the defence as “Information which may cast doubt on the credibility or reliability of the Crown witnesses.” This currently includes previous convictions perceived to be of value to credibility in a rape allegation, e.g. crimes of dishonesty such as benefit fraud or shop-lifting. If the provisions contained in the Criminal Justice and Licensing (Scotland) Bill 2009 are enacted the type of records that will be liable to be disclosed will extend to the complainer’s medical, mental health and counselling records. Such records would already be in the Crown’s possession if they considered them necessary in order to make the decision to prosecute. Or, if the Crown were aware of their existence but thought they had no bearing on the case and thus had not recovered them, the records would be in the hands of third parties e.g. the medical profession, local authorities, counsellors and therapists.

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148 Temkin, n. 79.
149 n. 88.
150 n. 88 at para 16 of Executive Summary.
7.17 Current Crown Office practice is published,\textsuperscript{151} and the proposed Code of Practice in the Criminal Justice and Licensing (Scotland) Bill 2009 will no doubt enhance this.\textsuperscript{152} but it seems very likely that if the Crown were aware the complainer had been in contact with social work services, or had received psychiatric or psychological treatment, including counselling, they might seek to recover these records to establish what, if any, bearing they had on her credibility and reliability. This would be seen as an essential precautionary step in the process of establishing the strength of the prosecution case and of anticipating potential areas of weakness for defence cross-examination. If the Crown decided these records met the common law test of relevance or materiality\textsuperscript{153} – a test likely to become embodied in statute – they would either be obliged to disclose them to the defence, or apply to the court for permission to withhold them on the grounds of public interest immunity (PII). To make a successful PII claim the Crown has to show that the public interest in the complainer retaining confidentiality of her records outweighs the right of the accused to obtain disclosure in order to conduct his defence properly and receive a fair trial.\textsuperscript{154} It is a balancing act to determine which party is caused more prejudice, bearing in mind the probative value of any information in the records.

7.18 The Coulsfield Review acknowledged that “[i]t is therefore fair to say that victims and witnesses have much to lose from an enhanced system of disclosure of information to the accused and his representatives”.\textsuperscript{155} The Review notes that “the accused’s right to a fair trial must ultimately take precedence over any other person’s right to privacy”.\textsuperscript{156} While that is so, it is possible to honour privacy interests without prejudicing a fair trial. The balancing of these separate interests remains a nuanced, interpretative exercise. Article 6 rights can accommodate the interests of witnesses in certain circumstances.\textsuperscript{157} The Supreme Court of


\textsuperscript{152} Section 114 of the Criminal Justice and Licensing (Scotland) Bill 2009 requires the Lord Advocate to issue a Code of Practice providing guidance on disclosure.

\textsuperscript{153} The test was laid down in \textit{McLeod v HMA (No.2)} (1998) J.C. 67.


\textsuperscript{155} Coulsfield, n. 88 at para 6.3.

\textsuperscript{156} Coulsfield, n. 88 at para 6.4.

\textsuperscript{157} \textit{Doorson v The Netherlands}, n. 142.
Canada has regularly affirmed that trial procedures have to be fair, but not "the most favourable procedures that could possibly be imagined". The statutory framework proposed in the Criminal Justice and Licensing (Scotland) Bill recognises it will be a balancing act. In effect this leaves it to judicial discretion and the development of the common law. Given the criticisms that have been levelled at the courts in admitting sexual history evidence into the courtroom, there may be concerns that regulation of disclosure of records will follow a similar pattern, whereby a consensus emerges as to what constitutes “material” records with the consequence that the boundaries are rarely challenged. One way of averting this difficulty is to acknowledge the discreet privacy rights of the complainant and permit her an independent legal representative to protect her interests.

7.19 Despite the prosecution’s general duty to disclose, there was an indication in Burman et al.’s study that some Advocate Deputes would be resolute about opposing “fishing expeditions”. One explained it in this way:

I refuse absolutely to use the Crown's powers to seize social work or medical records, unless I actually need them to prove the case, and insist that they [the defence] make an Application to the court to recover these records so that the process is intimated to the complainer who can vindicate her position, and make the Judge take a decision.

However, how a complainer is supposed to “vindicate her position” without legal advice and assistance is not made clear. Advocate Deputes cannot provide that guidance as they are not acting in an advisory capacity for the complainer and most likely will only meet the complainer when they introduce themselves at the start of the trial. Instead, prosecutors can only refer applications for records back to the precognoscer at the local Procurator Fiscal’s office to pursue with the complainer. The Crown cannot argue exclusively for the complainer’s interests in confidentiality whereas an independent legal representative would have no such constraints.

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159 n. 10 at para 4.65, emphasis added.
7.20 Issues of precisely this nature have been the subject of complex legal arguments in Canada where the Canadian Charter of Rights and Freedoms gives citizens constitutionally embedded rights of equality and privacy.\textsuperscript{160} Being a rape complainant whose records might be recovered is automatically an equality issue because “[w]omen are disproportionately more likely to generate medical and therapeutic records due to the high rates of sexual assault against them.”\textsuperscript{161} It is a privacy issue for complainants in sexual offences because “[t]he values protected by privacy rights will be most directly at stake where the confidential information contained in a record concerns aspects of one’s individual identity or where the maintenance of confidentiality is crucial to a therapeutic, or other trust-like, relationship.”\textsuperscript{162} Canada recognises the distinctive needs of rape complainants and permits them to instruct their own independent counsel to look after their interests in applications by the defence for recovery of medical and therapeutic records and other confidential papers.\textsuperscript{163}

7.21 In contrast to the protections given by the Canadian Charter, the Scottish complainer has to rely on rather bland expressions of privacy interests in statute. There is no definition in case law or in statute as to what constitutes a complainer’s privacy rights. The ECHR article 8 rights provide:

Article 8

1 Everyone has the right to respect for his private and family life, his home and his correspondence.

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for

\textsuperscript{160} For full discussion see S. McDonald and A. Wobick (2004) \textit{Bill C-46: Records Applications Post-Mills, A Caselaw Review}, Ottawa: Department of Justice, Canada.

\textsuperscript{161} J. Roberts, cited in McDonald and Wobick, n. 161 at para 3.5.

\textsuperscript{162} \textit{R v Mills} [1999] 3 S.C.R. 688 at para 89.

\textsuperscript{163} For the nature of the legal arguments raised in such applications see \textit{R v Shearing} [2002] 3 S.C.R 33. That case concerned the admissibility in evidence of the complainant’s diary which had fallen into the hands of the defendant.
the protection of health or morals, or for the protection of the rights and freedoms of others.

As noted earlier, the spirit of article 8 is given some recognition in s. 275 (2) (b) of the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 (SOPESA), which requires judges to regulate the admissibility of “sexual or other behaviour evidence” in such a way that ensures the complainer’s “dignity and privacy”. However, this is a vague and fluid provision which gives judges wide discretion – it does not give complainers enforceable rights. The failure to identify in more detail the conditions which would constitute adequate protection of dignity or privacy, or to detail factors that judges should take into account in applying the section is problematic. Complainers have no equality rights to invoke of the type held by Canadian citizens. It is therefore difficult to articulate precisely what protection a complainer can expect.

7.22 This illustrates one of the major problems of complainers not having a right to ILR. A complainer has no-one to advance the case for her rights and how they are to be balanced against the rights of the accused. The boundaries of the law are therefore hardly ever tested, and legitimate claims to the protections of the ECHR are barely progressed. The ECHR may be a living instrument capable of reflecting shifting social values but only if a party has the financial means and legal resources to pursue their cause.

EXPERT PSYCHOLOGICAL AND PSYCHIATRIC REPORTS

7.23 As a general rule opinion evidence from experts as to the credibility of a complainer is not permitted if it is evidence which is well within the knowledge and experience of the trier of fact. As Lord Justice Lawton said in R v Turner, “Jurors do not need psychiatrists to tell them how ordinary folk who are not suffering from any mental illness are likely to react to the stresses and strains of life.” The Turner rule, as it has become known, has been criticised for revealing a narrow and uninformed view of the behavioural sciences. It presupposes human behaviour is common sense and transparent to jurors, a belief that is much contested by researchers who claim that “‘ordinary, reasonable men and women’ have

165 Turner n. 165 at 841.
a systematically biased understanding of normal human behaviour.\textsuperscript{166} This argument resonates with critics of juror reliance upon rape mythology and stereotyping in sexual offence trials.\textsuperscript{167}

7.24 The Scottish Parliament has enacted a significant, if limited, relaxation of the common law rule in \textit{Turner} of the admissibility of expert evidence. Section 5 of the Vulnerable Witnesses (Scotland) Act 2004,\textsuperscript{168} provides:

> Expert psychological or psychiatric evidence relating to any subsequent behaviour or statement of the complainer is admissible for the purpose of rebutting any inference adverse to the complainer’s credibility or reliability as a witness which might otherwise be drawn from the behaviour or statement.

The provision is not intended to be used to bolster a complainer’s credibility generally – it can only be invoked to rebut evidence already led and which, without further explanation, might lead a jury to an uninformed conclusion. But, as the Crown Office Review accepted:

> In practice, however, this may be a tenuous distinction and it is for the prosecution to predict what adverse inferences might be drawn and be in a position to offer to a jury an explanation about how a victim of a sexual offence might respond.\textsuperscript{169}

The problem with this is that in order to predict adverse inferences, and be prepared to respond, the prudent approach might be for the Crown to seek a pre-trial psychological and / or psychiatric report. As soon as that is available, current and proposed disclosure practices dictate that, if deemed material, it either has to be produced to the defence, or an application


\textsuperscript{168} Inserting a new s. 275C into the Criminal Procedure (Scotland) Act 1995.

\textsuperscript{169} n. 28 at para 8.54.
made to withhold it on the grounds of PII, an application which the defence may well successfully contest. Prosecutors may ask the complainer for permission to recover her records, but they are not necessarily obligated to do so. Even if she gives consent she may not appreciate that, thereafter, she has no control over their subsequent wider circulation. She cannot require the Crown to oppose a defence application for disclosure, nor can she influence the nature or strength of any opposition to disclosure. To expect her to co-operate in an exercise where her privacy rights might be heavily compromised, without access to independent legal advice, is a very serious step.

7.25 The use of expert evidence is fraught with difficulties for complainers with much scope to be counter-productive. The experience in other jurisdictions suggests it is a strategy to be treated with the greatest of care. It clearly has the potential to be used by the defence to undermine the credibility or the reliability of the complainer. Where a prosecutor has ordered a report and found it meets the materiality test, he or she has no locus to oppose disclosure to the defence or its subsequent use by them other than by claiming PII. This presents an obvious conflict for the Crown, one that could be circumvented by the appointment of an ILR. Under the new statutory regime proposed in the Bill, discussed in Chapter 4, the onus is on the Crown to argue for non-disclosure based upon the statutory grounds set out in sections 102-104, but as matters presently stand they can only do so through their overarching matrix of responsibilities for competing sets of interests: those of the public, accused and complainer. For all the reasons canvassed at length earlier, this is not a tenable position for the Crown.

CHARACTER EVIDENCE AND SEXUAL HISTORY EVIDENCE

7.26 Fear on the part of complainers of not being believed, or of attacks on their credibility during cross-examination, is a renowned disincentive to the reporting of rape. The Scottish Law Commission recently observed that, “It is a striking feature of sexual offence trials, and rape trials in particular, that there is often a sense of the victim being on trial as much as the

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Specific concerns relate to the use of sexual history or general character evidence. Evidence of a complainant’s sexual history or character is used in court to raise questions about a woman’s credibility and reliability. In particular, defence counsel seek to introduce such evidence to infer, for example, that the woman has a motive to make a false allegation, has a propensity to lie, or was too drunk to recall accurately whether or not she consented to sex. For example, in R v NR medical records were disclosed to the accused revealing when the complainant lost her virginity. These were deemed relevant by the judge as they “had a bearing on the complainant’s credibility”...

7.27 Statutory regulation of sexual history and sexual character evidence was first introduced in Scotland in 1985 and the legislation has been amended on several occasions in response to complaints that it was still failing to protect women from gratuitous attacks on their character. The most recent reforms are contained in the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002, (SOPESA). One of the two principal declared policy objectives underlying this latest legislation is “to strengthen the existing provisions restricting the extent to which evidence can be led regarding the character and sexual history of the complainant.”

The Burman et al. evaluation research of the provisions of SOPESA raised concerns about the ability of the new legislation to fulfil that objective. The researchers found that rather than reducing the use of sexual history and character evidence, under the new legislation there has been a significant increase in this type of evidence. Approximately 7 in 10 women giving evidence in the High Court in rape or attempted rape trials were asked questions about their sexual history and character. In the majority of cases, the Crown did not object to defence applications to introduce this type of evidence. The extended definition of character evidence included non-sexual evidence, for example, evidence of drug addiction or dishonesty short of a criminal offence.

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173 SOPESA extended the type of character evidence that is potentially admissible to include non-sexual evidence, for example, evidence of drug addiction or dishonesty short of a criminal offence.
176 See n. 10.
evidence to include evidence of character that is not just of a sexual nature has predictably contributed to the increased numbers of applications. This broader definition of character plays into the potential archival value of psychiatric, psychological and social work records for attacks on a complainer’s character.

7.28 The reported case law also suggests a substantial gap between the intention of the legislature and the implementation in the courts. For example, in the first two reported cases on the admissibility of sexual history evidence, Cumming v HM Advocate,177 and Kinnin v HM Advocate,178 the appeal court upheld appeals against the refusal of each trial judge to admit certain questions that they respectively deemed to fall foul of the legislation. In neither appeal did the Crown support the trial judge’s decision. This prompted Sir Gerald Gordon QC, a temporary High Court judge and one of Scotland’s most respected criminal law commentators, to observe in his editorial commentary to the report of Cumming:

It is early days yet, but the impression given by this case and by Kinnin is that neither the Crown nor the court are likely to limit the scope of the defence evidence unduly, and that the Act may not be quite as restrictive as one might have expected, or as perhaps its supporters wished.179

In his editorial comment in Kinnin Sir Gerald also remarked:

I do not propose to enter into the question whether the Crown have a duty to protect complainers in cases of sexual offences or whether they should have opposed the appeals in those cases, but their disinclination to do so does raise the question of whether the person who is directly affected by the evidence, and whom the statute is designed to protect, should herself have some locus to object to proposed evidence.180

179 At 270.
As Sir Gerald identified, the Crown’s failure to posit any opposition to the applications to lead sexual history evidence in terms of section 275 in either of those trials, or subsequently to oppose the appeals, raise serious questions over their willingness and capacity to protect the legitimate interests of complainers. Given the extensive reforms the Crown Office have introduced since these decisions, one expects that a more pro-active and imaginative rebuttal of applications for character evidence would be mounted today. However, their capacity to do so will always be hampered by their duty to protect other interests in fundamental conflict with those of complainers.

7.29 The significance of the consequences of the Crown’s approach in such decisions should not be under-estimated. As the first two reported appeals under the new provisions of SOPESA, *Cumming* and *Kinnin* were key indicators of the Crown’s approach to the legislation. Judicial interpretations by the appellate court in early cases under new legislation also have a deep impact on subsequent decision-making by prosecutors, defence counsel and of course trial judges who are bound by the precedent set by higher courts. Ironically, the trial judiciary who have been on the receiving end of much criticism over the years concerning the ease with which sexual history evidence is admitted, acted in the spirit of the legislation in *Cumming* and *Kinnin*, but were confounded by the failure of the Crown to canvass any arguments before the appeal court.

**IS ILR UNNECESSARY AS THE JUDGE HAS A PROTECTIVE ROLE?**

7.30 A further argument against the need for ILR is that in addition to the Crown’s responsibilities the trial judge has a duty towards the complainer, and is empowered to intervene to regulate inappropriate questioning or treatment of her and of all witnesses. The duty is to protect complainers throughout the trial process and at preliminary hearings – for example, applications to introduce sexual history evidence or applications for the use of special measures for a vulnerable witness. This duty confers powers to intervene to prevent improper conduct from counsel, and otherwise to have concern for the complainer’s interests. However, this is a very difficult balance for judges to strike. Excessive intervention may form grounds of appeal if an accused perceives he has been prejudiced. The judge’s role in an adversarial process is primarily to act as an umpire, as Lord Justice-Clerk Thomson explained in 1962:
A litigation is in essence a trial of skill between opposing parties, conducted under recognised rules and the prize is the judge's decision. We have rejected inquisitorial methods and prefer to regard our judges as entirely independent. Like referees at a boxing contest, they see the rules are kept and count the points.\(^{181}\)

This role as an even-handed adjudicator does not sit easily with that of an intervener acting to protect one party’s interests. Although s. 275(2)(b) of SOPESA requires judges to ensure the “appropriate protection of the complainer’s dignity and privacy” when exercising their discretion to admit sexual history evidence, judges are always concerned not to intervene in such a way as to trigger an appeal and lead to the possible quashing of a conviction.

7.31 In *Black v Ruxton*\(^ {182}\) a sheriff rebuked a defence solicitor for repeatedly asking a 15 year old girl during cross-examination why she had delayed reporting allegations of sexual abuse. The girl broke down and had to be taken from the court. When the trial resumed the sheriff gave her a glass of water. The accused was subsequently convicted and appealed on grounds alleging bias on the part of the sheriff. Although the sheriff’s actions were ultimately sanctioned by the appeal court as within his discretion, the very fact that his practice was challenged could act as a disincentive to other judges to act in a similar fashion.

7.32 There is also understandable universal acceptance amongst the judiciary of the need for counsel to be permitted to “do their job” i.e. present the evidence and cross-examine the witnesses in as forceful a way as possible to discharge their duty to the accused to represent him to the best of their ability. Clients who are dissatisfied with the services of their counsel may pursue the so-called “Anderson appeal”, an appeal based on alleged defective representation.\(^ {183}\) The Court of Criminal Appeal has stressed the need for a robust approach to cross-examination of complainers of sexual offences to test their credibility in order to avoid any suggestion that representation was defective.\(^ {184}\) Prosecutors rarely object to defence questioning for all the reasons discussed earlier. Independent legal representatives

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\(^{183}\) *Anderson v HM Advocate* 1996 J.C. 29.

\(^{184}\) *E v HM Advocate* 2002 J.C. 215.
acting for the complainer need have no such qualms. The presence of an independent lawyer, while not removing judicial discretion to intervene to protect complainers’ interests, could relieve judges of many of the dilemmas surrounding the decision to intervene, as the main responsibility to raise objections would shift to the complainer’s lawyer.
CHAPTER EIGHT

SUMMARY AND CONCLUSIONS

IS ILR FEASIBLE?

8.01 This Report set out to explore the feasibility and any benefits of introducing independent legal representation for complainers in sexual offence trials in Scotland and the likely objections it would provoke. Scotland currently has no independent legal support measures available to complainers of sexual offences. In contrast, legal advice, support and representation is available in some form in most other European countries. It is often assumed that Scotland’s adversarial system precludes ILR. This is not necessarily so. It depends on the form of ILR one seeks to introduce. Several common law jurisdictions, e.g. Ireland and Canada, have introduced specialised procedures for legal representation at specific procedural stages, or, as in the US, promote a far more robust, prosecutorial-driven case-building approach linked to more direct access by complainants to prosecutors.

8.02 No fully argued case has ever been made in Scotland against the introduction of ILR. However, one can predict that the objections cited in other jurisdictions to ILR would also arise here. These objections include lengthened proceedings, duplicated work, expense and, above all, the threat to a fair trial. Such objections are part of the normal process of democratic debate, policy-making and law reform in any country committed to human rights and liberties. Speaking of opposition to ILR in the US, William Pizzi has observed:

Defense attorneys understand that constitutional recognition of a status for victims of serious crimes, independent of the prosecutor, has a tremendous symbolic value, and they do not want to see it accorded victims.185

8.03 There is no reason to suppose the opposition in Scotland would be any less determined, but without a public debate, arguments on behalf of proponents and opponents of ILR will never be fully articulated. Although there are undoubtedly procedural difficulties in

185 n. 47 at p. 354.
introducing ILR, there are no insurmountable theoretical obstacles to its use in a jurisdiction that favours an adversarial system. As other countries have demonstrated, with appropriate adjustments, it is possible to accommodate ILR within the adversarial process, observe the right to a fair trial, and find a response that is compatible with the ECHR or other constitutional imperatives. Scotland is just as capable of finding a resolution. Far better that the debate takes place than have a position where ILR is never even considered but simply presumed implausible or inappropriate.

WHAT ARE THE BENEFITS OF ILR?

8.04 To identify the benefits for complainers one need look no further than the conclusion from the Irish study, one of the most important empirical research reports published which found “a highly significant relationship... between having a lawyer, and overall satisfaction with the trial process. The presence of a victim’s lawyer also had a highly significant effect on victims’ level of confidence when giving evidence, and meant that the hostility rating for the defence lawyer was much lower.”\(^{186}\)

8.05 From a complainer’s perspective, there are huge advantages in having an entitlement to a single adviser with the specialist knowledge and legal authority to access information and make representations to the court. While support services for complainers have improved greatly, there is a fundamental distinction between what the State can offer and what an autonomous and independent lawyer conferred with statutory powers can offer. VIA staff play an important support role, but they are a conduit of information to and from other COPFS staff. There is nothing less empowering for a complainer than being at one end of the chain without a representative able to influence the decision at the other end. It is highly significant that research with Canadian Crown counsel in regard to disclosure of records applications found they believed that when there is independent counsel involved “…everyone takes it more seriously”.\(^{187}\)

\(^{186}\) See Bacik et al., n. 38 at pp. 17-18.

8.06 Apart from raised levels of confidence, complainers could receive the continuity of support and shared knowledge and understanding that accompanies an effective relationship of trust with one legal adviser committed to the complainer’s interests. Overall, it could go a considerable way towards alleviating the long-standing discontent of complainers about their treatment and lack of support within the trial process. The availability of an entitlement to ILR might well improve the willingness of victims to report sexual offences.

8.07 From the perspective of those responsible for the investigation and prosecution of crime, the introduction of ILR would remove the irreconcilable conflict that arises for prosecutors in tending to the conflicting interests of the complainer, the public and the accused. For prosecutors, the complainer’s rights can never be an exclusive consideration, whereas for a legal representative they have to be. Independent lawyers have only one interest to pursue – that of their client – subject always to their professional and ethical duties to the court. They are unburdened by the prosecutor’s duty to balance a series of interests. The very fact of partisan advocacy would give a complainer assurance that her voice will be heard.

8.08 The most cogent argument for ILR in Scotland arises in response to breaches of the complainer’s dignity and privacy. There is no scope for the Crown to embark on a policy of developing a coherent framework for complainers’ privacy rights as the Crown are constitutionally bound to locate these interests within the wider public interest. In these conditions, as the interests of the complainer are not constitutionally embedded, they are always destined to be subordinate.

WHAT ARE THE OBJECTIONS TO ILR?

8.09 There is a possible objection to ILR for complainers of rape and serious sexual offences on the ground it would give them preferential treatment and open the floodgates to demands for ILR for all complainers. The response to that objection is that the nature of the trauma experienced by complainers in sexual offences and the focus on their character places them in a special category deserving of distinctive treatment. One of the hallmarks of a civilised society is the manner in which it responds to rape, one of the most violent and traumatic crimes, and one which uniquely engulfs those who endure it in shame and degradation.

188 Chambers and Millar, n.113
8.10 There would be increased cost to public funds in paying for the legal services of those providing ILR, but there is already a considerable cost to the public purse from abandoned prosecutions and the profound damage to complainers who may need long term physical and psychological support from health and welfare services. There would also be difficulties in identifying suitably qualified people to perform the role of an independent legal adviser. Given the importance of developing professional trust, it would not readily be a role that could be filled by those who routinely acted as defence counsel. This is a point noted in the research literature – complainers are not comfortable with those seconded from the ranks of the defence Bar.\(^{189}\)

8.11 In whatever manner the role of ILR is conceptualised, proposals for third party representation will likely be greeted by some with scepticism, and possibly even with hostility. Nonetheless, the status quo appears unsustainable if Scotland wishes to rid herself of an unenviable reputation in regard to the prosecution of sexual offences, haunted by an astonishingly low conviction rate for rape. Although no research has yet been conducted to establish whether these conviction rates bear any causal connection to the absence of ILR, informed observers might reasonably conclude that ILR would be much more likely than not to facilitate the complainer’s best evidence and thus to improve conviction rates. The proposition that ILR should be explored as an option in adversarial systems was endorsed by Mary Robinson, the (then) UN High Commissioner for Human Rights in her Foreword to the Irish study:

\[
\text{Given the differences which exist between adversarial and inquisitorial systems, it might be difficult to introduce as comprehensive a right to representation for victims of crime as exists in some of the member states, but it is surely worth considering the introduction of some form of representation for victims.}^{190}\]

A decade later Irish complainers at least have the foundations of such representation. Perhaps the time is right for Scotland to open a public debate and make the first step towards it.

\(^{189}\) Bacik et al., n. 38.

\(^{190}\) Foreword to Bacik et al., n. 38 at p. xii.
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